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No. 94 462

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

CITY OF GRAPEVINE, TEXAS,

*Petitioner*,

vs.

DEPARTMENT OF TRANSPORTATION; FEDERICO PEÑA, as Secretary of Transportation; FEDERAL AVIATION ADMINISTRATION; DAVID R. HINSON, as Administrator of the Federal Aviation Administration; and DALLAS/FORT WORTH INTERNATIONAL AIRPORT BOARD,

*Respondents*.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether a federal agency may approve an undertaking adversely affecting historic properties before completing the consultation and review procedures mandated by the National Historic Preservation Act.

2. Whether a federal agency may approve an Airport Layout Plan for a $3.5 billion airport expansion while restricting its environmental review to two segments of the plan that represent approximately ten percent of the expansion project's cost.

3. Whether the National Environmental Policy Act permits a federal agency to use multiple "categorical exclusions" to excise from its environmental review substantial elements of an integrated project.

## PARTIES TO THE PROCEEDING IN THE DISTRICT OF COLUMBIA CIRCUIT

1. City of Grapevine, Texas, Petitioner

2. City of Euless, Texas, Petitioner*

3. City of Irving, Texas, Petitioner*

4. Irving Independent School District and Owners and Trustees, Petitioners*

5. Robert S. Newkirk, Trustee, *et al.*, Petitioners.*

6. United States Department of Transportation, Respondent

7. Andrew H. Card, Secretary of Transportation, Respondent**

8. Federal Aviation Administration, Respondent

9. Barry Lambert Harris, Acting Administrator of the Federal Aviation Administration, Respondent**

10. Dallas/Fort Worth International Airport Board, Intervenor/Respondent

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* City of Euless, City of Irving, Irving Independent School District, and Robert S. Newkirk, Trustee, *et al.*, petitioners below, are not petitioners before this Court.

** Andrew H. Card, former Secretary of Transportation, and Barry Lambert Harris, former Acting Administrator of the Federal Aviation Administration, were named as parties in the proceedings below. Pursuant to Supreme Court Rule 35.3, Federico Peña and David R. Hinson, successors to Mr. Card and Mr. Harris, respectively, have been substituted as parties in this proceeding.

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## PETITION FOR WRIT OF CERTIORARI

The petitioner, the City of Grapevine, Texas ("Grapevine"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in the above-captioned case.

## OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 17 F.3d 1502 and is reprinted in the Appendix at A-1-15.[1]

## JURISDICTION

The judgment of the Court of Appeals was entered on November 19, 1993; the court's opinion was issued on March 18, 1994. The order of the Court of Appeals denying Grapevine's petition for rehearing was entered on May 9, 1994. *See* Appendix at A-16. A timely application for an extension of time in which to file a petition for a writ of certiorari was granted on July 15, 1994 by Chief Justice William Rehnquist to and including September 6, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved in this case are: the National Historic Preservation Act, 16 U.S.C. §§ 470 *et seq.*, specifically section 106, which is set out in the Appendix at A-18; section 4(f) of the Department of Transportation Act, 33 U.S.C. § 138; the National Environmental Folicy Act, 42 U.S.C. §§ 4321 *et seq.*; 36 C.F.R. Part 800, specifically sections 800.4-.6, which are set out in the Appendix at A-19-26; 40 C.F.R. Parts 1500-1508, specifically section 1508.4, which is set out in the Appendix at A-27; and Federal Aviation Administration Order 5050.4A, specifically paragraphs 23-24, which are set out in the Appendix at A-28-31.

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[1] "A- __" refers to pages of the Appendix hereto. Documents from the Joint Appendices submitted to the Court of Appeals for the District of Columbia Circuit in this case are cited as "Jt. App. No. __." Documents from the Administrative Record in this case are cited as "Rec. No. __."

## STATEMENT OF THE CASE

This case presents important issues concerning the integrity and effectiveness of two basic statutes – the National Historic Preservation Act ("NHPA") and the National Environmental Policy Act ("NEPA") – enacted to protect the cultural heritage and environment of the nation. NHPA, enacted in 1966, and NEPA, enacted in 1969, make federal agencies stewards of the nation's historic places and natural resources and require federal agencies to incorporate likely impacts on historic places or, in the case of NEPA, the environment into their decisionmaking processes. This case concerns a federal agency's obligation to comply, in a timely manner, with the statutory procedures for considering those impacts.

These issues arise in the context of the approval by the Federal Aviation Administration (the "FAA") of a $3.5 billion expansion of the Dallas/Fort Worth International Airport (the "DFW Airport"). The petitioner submits that the FAA circumvented the reviews required by NHPA and NEPA by (1) granting final approval to the DFW Airport expansion before completing the historic review process required by NHPA and (2) using multiple "categorical exclusions" and other devices to segment the environmental review required by NEPA. By upholding the FAA's action, the court below disregarded the plain language of NHPA, ignored settled law under both NHPA and NEPA, and declined to consider the novel question presented by the FAA's use of multiple categorical exclusions to narrow the scope of its environmental review.

### A. The Dallas/Fort Worth Airport Expansion

The DFW Airport is located within the cities of Grapevine, Euless, Irving, and Coppell, Texas, approximately halfway between Dallas and Fort Worth. It currently occupies an area of approximately 17,500 acres, and since its opening in 1974 has become the second busiest airport in the United States.

A proposed Airport Development Plan ("ADP") for the DFW Airport was unveiled in 1988. As proposed, the ADP

contemplated: destruction of most of the existing passenger terminals; construction of two new passenger terminals; construction of more than 400 acres of new parking facilities; installation of new cargo, hangar, maintenance, people-mover, baggage, and other support facilities; construction of a new facility to support overnight package hub operations; a doubling of fuel storage facilities; realignment and expansion of existing roadways; construction of new roads; condemnation of additional real property outside the current boundaries of the DFW Airport; construction of two new control towers; extension of two existing runways; and construction of two new runways (the "East Runway" and the "West Runway") designed to accommodate large commercial aircraft. The various components of the ADP, including the East and West Runways, were incorporated by the DFW Airport into a proposal for a revised Airport Layout Plan ("ALP"), which required approval by the FAA.

## B. The Affected Communities

The cities of Grapevine, Euless, Irving, and Coppell, in which the DFW Airport is located, are predominantly residential communities with relatively large areas of parks and open space. Each community contains numerous churches, libraries, schools, hospitals, nursing homes, and other noise-sensitive uses. The City of Grapevine (the petitioner herein), the center of which is immediately to the northwest of the DFW Airport, includes fourteen churches, three schools, two nursing homes, three hospitals, a library, and 2,362 acres of parks serving its 29,000 residents, as well as residents of nearby communities. Several of Grapevine's parks and most of its other noise-sensitive uses are located in downtown Grapevine, where they will be directly under or near the flight paths of aircraft landing on or departing from the West Runway. Some of these facilities will be as close as one-quarter mile from the West Runway.

Grapevine, in particular, is a historic community, characterized by historic districts and several notable individual historic buildings. It was settled by Scotch-Irish farming families from

Missouri in the 1840's and by the 1880's had emerged as the small commercial center of northeast Tarrent County. By the early years of this century, the commercial center of Grapevine had developed along Main Street, which retains today much of its historic architectural character. The Main Street Conservation District "is characterized by a consistent streetscape of one-and two-story brick buildings," including four turn-of-the-century "brick buildings with cast-iron ground-floor columns in nearly unaltered condition."[2] The District is "a fine historic commercial district" and "a classic image of the small town American main street."[3] In addition, the historic center of the city is the site of the annual Main Street Days festival, the annual Christmas parade, park concerts, strolling, and numerous other outdoor civic, cultural, educational, and recreational activities.[4]

The city's early churches and schools and the residences of many of Grapevine's leading merchants and professionals were built to the east of Main Street in an area of several blocks located between Jenkins Street, Dooley Street, Wall Street, and East Hudgins Street. That area today includes a concentration of intact late nineteenth and early twentieth century houses. Among them are "Grapevine's single most imposing Victorian house, the Dr. Thomas Benton Dorris House . . ., and an outstanding early twentieth century house, the Mary Lipscomb Wiggins House . . .."[5] "The streetscape is characterized by consistent setbacks, broad lawns, some mature trees, with maintenance of houses and gardens at a generally high, often excellent, level."[6]

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[2] Historic Preservation Council for Tarrent County, Tex., Tarrent County Historic Resources Survey (1990) (DEIS Comments of Cities of Euless, Grapevine, and Irving, Appendix 91) (Rec. No. 32)) ("Tarrent County") at 7.

[3] *Id.* at 8.

[4] Mark Mailes, Grapevine Parks & Recreation Director, Parks and Historic Sites Impacted by Proposed Runway 16/34W (1990) (DEIS Comments of Cities of Euless, Grapevine, and Irving, Appendix 6) (Rec. No. 28)) ("Mailes") at 18.

[5] Tarrent County at 7.

[6] *Id.*

The area's "visual harmony, concentration of architecturally and historically significant houses and continuous history as the most elegant and prestigious street in Grapevine" make it likely to meet the criteria for a National Register Historic District.[7]

The historic residential district is almost directly under the projected flight paths of aircraft that will be using the West Runway; the historic Main Street district is only slightly to the west of those projected flight paths. Operation of that runway will double or quadruple existing noise levels in those historic districts. The resulting noise levels (in some cases comparable to the sound level inside a New York City subway or the noise experienced by a chain saw operator[8]) will severely compromise the turn-of-the-century character of Grapevine's historic districts.

Grapevine is thus concerned that the Main Street district, which has been the subject of a $3.5 million City-sponsored restoration project over the last decade, will become blighted as the noise from the West Runway's air traffic destroys the district's historic small town atmosphere and its pleasing environment for strolling and shopping, and that, as its businesses move out, Grapevine will be left with deserted buildings in what had once been the heart of its downtown.[9] Grapevine also believes that the operation of the West Runway will cause many homeowners in the historic residential district, who now cherish their homes and the elegant atmosphere of their neighborhood, to sell their homes and move away, leaving the historic homes to fall into disrepair as well.[10] Grapevine therefore sought to persuade the FAA to delete the West Runway from the ALP or, at the very least, to find a less severely impacting alternative that would not threaten Grapevine's historic districts or environment.

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[7] Mailes, Historical Analysis at 3.

[8] Letter from Claudia Nissley, Director, Western Office of Review, Advisory Council on Historic Preservation, to Vernell Sturns, Executive Director, Dallas/Ft. Worth International Airport, Sept. 28, 1993 (reprinted at A-42-49).

[9] Mailes, Historical Analysis at 2, 4.

[10] *Id.* at 3-4.

## C. The FAA's Decisionmaking Process

The FAA was charged with the responsibility of reviewing the revised ALP and determining whether portions of the expansion project (including the East and West Runways) were eligible for federal funding. In its April 7, 1992 Record of Decision ("ROD"),[11] the FAA both approved the ALP and declared the East and West Runways eligible for such funding, finding that *neither* runway would have any "adverse effect" on historic properties. The FAA made this determination even though it had not, as required by NHPA, consulted with the Advisory Council on Historic Preservation (the "Advisory Council"), had not complied with the procedures required by the Advisory Council's (or its own) regulations, and had not identified all eligible historic sites in Grapevine.[12]

The FAA did prepare an environmental impact statement ("EIS")[13] under NEPA purporting to analyze the environmental impacts of its actions. However, that EIS was limited to the expected impacts of the East and West Runways and excluded virtually all other components of the expansion plan shown in the ALP. The new or relocated radar and navigational systems, the two new air traffic control towers, and the new Doppler Weather Radar system were excluded from the EIS on the ground that other environmental assessments have been or will be prepared for them. The extensions of two existing runways and associated actions were excluded on the ground that they were examined in an EIS in 1974, which would be subject to a "technical reevaluation." The roadway improvements and regional

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[11] The ROD is printed in full in Jt. App. No. 1. Relevant portions are reprinted in the Appendix hereto at A-36-41.

[12] The ROD also stated the FAA's determination that no parks, recreation areas, or historic properties protected by section 4(f) of the Department of Transportation Act ("Section 4(f)") would be sufficiently adversely affected to invoke Section 4(f) because the noise levels at those sites would not exceed the levels the FAA used as guidelines for land-use incompatibility thresholds. The FAA made this determination even though it had not completed an inventory of the historic properties potentially affected by the West Runway.

[13] The Final EIS, dated December 1991 ("FEIS"), is included in Rec. Nos. 70-71. Relevant pages are reprinted in the Appendix hereto at A-32-35.

commuter rail system with access to the DFW Airport were excluded because they had been or would be examined by other federal agencies (the Federal Highway Administration or the Urban Mass Transit Administration). Finally, the new east and west terminal complexes, miscellaneous taxiway and apron improvements, land acquisitions, ground transportation improvements, AIRTRANS improvements, and air traffic procedure actions were considered to be "categorical exclusions."[14] All told, the elements excluded from the FAA's EIS accounted for approximately $3.1 billion of the $3.5 billion expansion project.

Despite the limited scope of the EIS, the FAA announced in the ROD its approval of the entire ALP – thus fixing the location of the East and West Runways and all other elements of the project – and its determination that portions of the expansion project, including but not limited to the East and West Runways, were eligible for federal funding.

### D. The Jurisdiction and Opinion of the Court Below

The cities of Grapevine, Euless, and Irving and the Irving Independent School District petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the FAA's final orders as embodied in the ROD. Pursuant to 49 U.S.C. app. § 1486, the District of Columbia Circuit had original and exclusive jurisdiction over these orders.

The court below, *inter alia*, found that the FAA had not violated NHPA procedures because its approval of the West Runway was "conditional," despite the ROD's characterization of its approval as "final"; upheld the scope of the EIS, deferring to the FAA's interpretation of its regulations on "categorical exclusions" and noting the EIS's brief sections on cumulative impacts; and upheld the FAA's Section 4(f) determination, again deferring to the agency in its use of its standard noise measurement guidelines.

The City of Grapevine respectfully submits that these rulings of the court below are inconsistent with the plain language of NHPA, the purposes of NHPA and NEPA, and settled law under both statutes.

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[14] FEIS at 1-38 to 1-39 (A-32-35).

## REASONS FOR GRANTING THE WRIT

### I. THIS COURT SHOULD RESOLVE A CONFLICT BETWEEN THE DISTRICT OF COLUMBIA CIRCUIT AND THE FIFTH CIRCUIT ON THE ISSUE OF WHETHER AN AGENCY MAY APPROVE AN UNDERTAKING ADVERSELY AFFECTING HISTORIC PROPERTIES BEFORE COMPLETING THE NHPA-MANDATED CONSULTATION AND REVIEW PROCEDURES

NHPA was enacted in 1966 to "foster conditions under which our modern society and our prehistoric and historic resources can exist in productive harmony," to "provide leadership in the preservation of the prehistoric and historic resources of the United States," and to "contribute to the preservation of nonfederally owned prehistoric and historic resources." 16 U.S.C. § 470-1.

NHPA is essentially a procedural statute. *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 859 (9th Cir. 1982). Unlike Section 4(f), NHPA imposes no substantive mandates on agencies;[15] rather, it sets forth mandatory procedures by which federal officials and agencies inform themselves about, and "take into account," the impacts on historic properties that may result from their proposed "undertakings," a statutory term that includes federal funding decisions, licenses, and other approvals. It is similar in this respect to NEPA, which requires that federal agencies inform themselves about the environmental impact of their actions. *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349, 351 (1989) (NEPA). Because the purpose of

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[15] It is for this reason, among others, that the noise standards the FAA employed for determining whether a park or historic resource is "used" for purposes of Section 4(f) (which imposes a substantive obligation to avoid such use wherever feasible) are not dispositive in determining whether a federal undertaking has adverse "effects" under NHPA. *See* Letter from Claudia Nissley, Director, Western Office of Review, Advisory Council on Historic Preservation, to Hugh W. Lyon, Assistant Division Manager, FAA, Southwest Region, June 8, 1993 (reprinted at A-61-63).

the procedures required by both NHPA and NEPA is to inform the decisionmaking process, plainly those procedures have value only if they are undertaken before a decision is made.[16] *See, e.g.*, *Sierra Club v. Marsh*, 872 F.2d 497, 500, 502 (1st Cir. 1989) (NEPA); *Commonwealth of Massachusetts v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983) (NEPA).

The procedures mandated by NHPA are set forth in section 106 of the statute ("Section 106") and the regulations promulgated thereunder by the Advisory Council and individual agencies. Section 106 provides:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having

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[16] The reason why the information-gathering procedures must precede the decisionmaking is not difficult to discern. Once a decision has been made, alternatives may be foreclosed and resources may have been committed. Even without actual ground-breaking or commitment of resources, the mere fact that a decision has been made will make changing course very difficult. Justice Breyer, as Chief Judge of the First Circuit, explained the problem in the context of NEPA as follows:

> . . . NEPA is designed to influence the decisionmaking process; its aim is to make government officials notice environmental considerations and take them into account. Thus, when a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered. . . . Moreover, to set aside the agency's action at a later date will not necessarily undo the harm. The agency as well as private parties may well have become committed to the previously chosen course of action, and new information – a new EIS – may bring about a *new* decision, but it is that much less likely to bring about a *different* one. It is far easier to influence an initial choice than to change a mind already made up.

*Commonwealth of Massachusetts v. Watt*, 716 F.2d at 952, *quoted in Sierra Club v. Marsh*, 872 F.2d at 500 (emphasis in original). The same reasoning applies to the decisionmaking process under the NHPA.

> authority to license any undertaking shall, *prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license*, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under part B of this subchapter a reasonable opportunity to comment with regard to such undertaking.

16 U.S.C. § 470f (A-18) (emphasis supplied).

The Advisory Council, an independent federal agency created by Congress to administer the NHPA, has issued regulations to flesh out the Section 106 procedures. Those regulations set out a specific consultation process to be followed by all federal agencies in carrying out their responsibilities under Section 106, *see* 36 C.F.R. Part 800, Subpart B, and have in turn been adopted specifically by many federal agencies, including the FAA. FAA Order 5050.4A ¶ 47e(8)(a), (b), at 38-40.[17] The Advisory Council regulations (the "Part 800 Regulations") require that, before approving any "undertaking," each federal agency shall: (1) identify, in consultation with the State Historic Preservation Officer (the "SHPO"), all historic properties that may be affected by the undertaking; (2) assess the effects of the undertaking on such properties in accordance with specific Advisory Council criteria, after giving consideration to the views of interested persons;[18] (3) seek, in consultation with the SHPO, the Advisory Council, owners of affected properties, and local governments with jurisdiction over such properties, ways to avoid or reduce any adverse historic effects; and (4) attempt to reach agreement with

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[17] FAA Order 5050.4A is printed in full in Rec. No. 325. Relevant portions are reprinted in the Appendix hereto at A-28-31.

[18] An agency's determination of no adverse effect from its proposed undertaking may be overruled by the Advisory Council. 36 C.F.R. § 800.5(d)(2) (A-22).

the parties to the consultation process on ways to avoid or mitigate any adverse effects of the undertaking on historic properties, memorializing the measures agreed on in a Memorandum of Agreement. 36 C.F.R. §§ 800.4-.6 (A-19-26).

To be meaningful, the Section 106 consultation process must be conducted *before* the agency makes its decision to proceed with an undertaking. *Vieux Carre Property Owners v. Brown*, 948 F.2d 1436, 1445 (5th Cir. 1991) ("the express language of NHPA § 106 requires the [agency] to afford the Advisory Council an opportunity to comment *prior to* its issuance of any license for an undertaking that may affect historic properties.") (emphasis in original).

In its ROD, the FAA admitted that it had not yet completed the Section 106 process for the West Runway. Indeed, it listed among the tasks to be completed "the identification of future possible eligible historic sites in Grapevine." ROD at 43 (A-37-38). That, of course, is the first step in the process. Despite its failure to identify such "possible eligible historic sites," the FAA determined: "There is 'no adverse effect' on historic properties as a result of the West Runway (16-34 West) project." *Id.* Further, the FAA made its "final determination" that the revised ALP incorporating ***both*** the East and West Runways "is approved," and approved both runways as "eligible for federal financial assistance." ROD at 1 (A-36).

The court below focused on the FAA's statement in the ROD that its approval of the West Runway was conditioned on future completion of the Section 106 process. ROD at 74 (A-41); *see* A-14-15. That statement, however, is belied by the ROD's repeated recitation that the FAA was giving "final, unconditional approval for Runway 16/34 West at this time." ROD at 72 (A-39). Even if the FAA's contradictory statements could be reconciled, however, conditioning the release of federal funds and actual construction of the West Runway on completion of the Section 106 process would do little to achieve the purposes of the NHPA. The one thing that is clear is that the ROD approved

the *location* of the runway.[19] "This decision removes any uncertainty regarding the configuration of this runway on the ALP." ROD at 72 (A-40).

The FAA has thus reduced the Section 106 review to an exercise in futility.[20] The FAA has already decided that the West Runway is necessary and that alternative locations for that runway are foreclosed. As noted above, the location fixed by the FAA for the West Runway will put the historic districts of Grapevine almost directly under the flight paths of aircraft using the West Runway. That is expected to subject those districts to noise levels as high as those experienced by a chain saw operator or New York City subway passenger and, as a result, to adversely affect the public's experience and enjoyment of the historic qualities of those districts.[21]

Because the purpose of the Section 106 review process is to avoid or mitigate adverse impacts on historic properties, one result of the consultation process — had it been followed in this case — might have been to select an alternative location for the West Runway. In the EIS, the FAA itself identified one such alternative (Alternative 2a) having operating characteristics virtually identical to those of the West Runway, but located 800 feet farther east (and thus not directly over Grapevine's historic districts). According to the EIS, Alternative 2a would cost somewhat more and require the filling of additional wetlands.[22]

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[19] That decision by itself is likely to affect the location, maintenance, and investment choices of property owners, commercial tenants, and lending institutions in both the downtown and residential historic districts — regardless of whether the West Runway is actually constructed.

[20] The Advisory Council has expressed this concern as well. *See* Letter from Claudia Nissley, Director, Western Office of Review, Advisory Council on Historic Preservation, to Clyde M. DeHart, Jr., Regional Administrator, FAA, Southwest Region, May 11, 1992 (reprinted at (A-64-66).

[21] Mailes, Historical Analysis at 2-4.

[22] FEIS at 3-15 to 3-16.

But it is precisely this type of balancing that NHPA requires federal agencies to undertake – and to do so with an informed understanding of the impacts of their actions on the nation's historic places and architectural heritage. Because the location of the West Runway has already been finally determined by the FAA, such an informed balancing of competing public interests, after consultation with the Advisory Council, is now impossible.

It is to avoid such an exercise in futility that the NHPA mandates consideration of impacts on historic resources *before* decisions are made, as the Court of Appeals for the Fifth Circuit has recognized. *See Vieux Carre Property Owners v. Brown*; *cf. Sierra Club v. Marsh* (NEPA); *Commonwealth of Massachusetts v. Watt* (NEPA).

Despite the clarity of the language of Section 106, and despite the logic of requiring review, consultation, and "tak[ing] into account" before decisionmaking rather than after, the court below, in contrast to the Fifth Circuit, upheld the FAA's decision to approve the entire ALP before completing the Section 106 process.[23] The petitioner submits that the decision of the court below was in error. This Court should resolve this conflict to avoid further inconsistent rulings on the timing of the procedural requirements of Section 106 – the heart of NHPA.

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[23] Two Ninth Circuit panels have let stand decisions taken before the completion of the Section 106 process, but in circumstances very different from those of the present case. *See Yerger v. Robertson*, 981 F.2d 460 (9th Cir. 1992); *Sierra Club v. Clark*, 774 F.2d 1406 (9th Cir. 1985). In *Yerger*, the action was a decision not to renew a special use permit for a resort in a national forest, which merely provided for the National Forest Service's reassumption of control over the area and foreclosed no options with regard to preservation of the resort building. 981 F.2d at 465. *Sierra Club* concerned the granting of a permit for a motorcycle race on public land, a one-time event that was already over by the time of the court's decision.

## II. THE COURT BELOW DISREGARDED SETTLED LAW ON SEGMENTATION IN APPROVING AN EIS THAT WAS LIMITED TO THE EAST AND WEST RUNWAYS AND OMITTED THE BALANCE OF THE ALP

It is well settled that, in determining the scope of an EIS for a proposed federal action, an agency may not "segment" its review by dividing the action into its component parts to be analyzed at different times, if at all. Rather, the agency should analyze in one EIS the environmental impacts of all related components that comprise the proposal. *See, e.g., Thomas v. Peterson*, 753 F.2d 754, 758-761 (9th Cir. 1985) (decision to construct road in national forest without analyzing environmental impacts of timber sales that the road would facilitate was improper segmentation); *City of Rochester v. United States Postal Service*, 541 F.2d 967, 972-73 (2d Cir. 1976) (Postal Service decision to build mail facility outside the city without analyzing environmental impacts of removal of employees and abandonment of old facility in the city's central business district was improper segmentation); *Chelsea Neighborhood Ass'n v. United States Postal Service*, 516 F.2d 378, 387-89 (2d Cir. 1975) (Postal Service determination to construct vehicle maintenance facility without analyzing adverse impacts of associated housing was improper segmentation, particularly where benefits of that housing were used to justify project).

In determining the scope of its EIS, the FAA excluded from environmental review most of the elements making up the DFW Airport expansion project as shown in the ALP. Instead, the EIS analyzed, in substance, only the East and West Runways. The ROD, however, approved the ALP for the entire expansion project, not just the East and West Runways. Moreover, the various elements of the expansion project and ALP are interdependent. Both the East and West Runways are needed in part because of the increased capacity of the planned new terminals.[24]

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[24] Oris Dunham, Executive Director of the DFW Airport, stated: "Without the extra gates the new terminals would have, you don't need to [build] the new

*(Footnote continued)*

Conversely, the new terminals are designed to serve the East and West Runways and thus reduce airport delays. In either case, the terminals' exclusion from the EIS analysis, like exclusion of the housing component in the *Chelsea* case, was improper.

In response to criticism from the United States Environmental Protection Agency (the "EPA"), among others, that the FAA improperly segmented its environmental analysis,[25] the FAA referred to its regulations permitting it to "categorically exclude" from environmental review many of the elements of the expansion project, including the new terminals; to defer environmental review of other elements until some time in the future; and to relegate others to "technical" review. The court below deferred to the FAA's interpretation of its regulations and upheld the FAA's exclusion of those elements from its EIS. Rather than judging the FAA's environmental review of the DFW Airport expansion project in light of the purpose of NEPA and the well-established law on segmentation, the court below merely considered whether the FAA's scoping process accorded with the FAA's scoping regulations, particularly its regulations on categorical exclusions,[26] and noted that the FAA had considered the cumulative impacts of some of the project elements otherwise excluded from the EIS. *See* A-4-8. The court's analysis was deficient on two counts.

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runways. And without the new runways, the airlines won't build the new terminals and gates." *Fort Worth Star-Telegram*, Sept. 29, 1989, § 1 at 2 (DEIS Comments of Cities of Euless, Grapevine, and Irving, Appendix 128) (Rec. No. 33)).

[25] The EPA commented: "By failing to include all of these [excluded] actions and their associated impacts in a single EIS, a comprehensive environmental assessment of the entire airport expansion has not been provided and disclosed to the public. . . . [I]t appears that the FAA is segmenting the environmental analysis of the entire airport expansion." Letter from Robert E. Layton, Jr., Regional Administrator, EPA, to Clyde M. DeHart, Regional Administrator, FAA, Southwest Region, Jan. 14, 1991 (FEIS, Appendix 17, at 44) ("EPA Letter") (A-51).

[26] The FAA's use of categorical exclusions to shield from review multiple elements of a comprehensive project presents an important issue that, to our knowledge, has not been decided by this Court or any lower court. That issue is addressed in Point III below.

First, it failed to consider whether the FAA's scoping regulations accorded with the law under NEPA. Although agencies may certainly limit the circumstances in which they are obligated to prepare EISs and limit the scope of those they do prepare, the limits they devise must be subject to a rule of reason and must not vitiate the purposes of NEPA. If the FAA's regulations permit the FAA to avoid informing itself about the environmental impacts of 90 percent of a project of the magnitude of the DFW Airport expansion before approving the ALP for that project, then those regulations defy NEPA's essential purpose of fostering informed decisionmaking. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. at 349.

Second, the court below appears to have accepted the FAA's few brief and conclusory paragraphs in the FEIS on "cumulative impacts" as a substitute for full environmental analysis of the numerous elements of the expansion project. Even if consideration of cumulative impacts could properly substitute for full analysis of the environmental impacts of a comprehensive project, the most cursory review of the FAA's cumulative impact sections reveals their inadequacy. The EIS sections labeled as discussions of cumulative impacts consist essentially of a statement that cumulative impacts were considered, a list of the elements whose cumulative impacts were considered, and a conclusory statement that any cumulative impacts would not be significant. A typical example, in its entirety, reads as follows:

> 4.4.1.5 POTENTIAL CUMULATIVE IMPACTS
>
> The potential cumulative noise impacts of the proposed runway development actions and other ADP actions were considered. These actions include: the new terminal complex on the west side of the airport; miscellaneous taxiway and apron improvements; two air traffic control towers; ground transportation improvements; and expansion of the airtrans system.
>
> These ADP actions are not anticipated to result in any substantial additional increase in noise levels beyond that which would occur from the operation of the

> runways and their associated improvements alone. They are not considered to materially influence aircraft fleet mix, numbers of operations, times of operation, or runway/flight track utilization. Although the proposed ground transportation improvements would change the location of automobile traffic patterns, these changes would occur entirely on airport property.

FEIS at 4-72. Such conclusory statements "do not equip a decisionmaker to make an informed decision about alternative courses of action." *Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288, 298 (D.C. Cir. 1988).

By focusing only on the FAA's interpretation of and compliance with its own environmental regulations, the court below avoided the real issue of whether the FAA improperly segmented its environmental review of the DFW Airport expansion project. This Court should resolve the issue of whether an agency may hide behind its regulations to avoid compliance with NEPA.

## III. THIS COURT SHOULD RESOLVE THE NOVEL QUESTION OF WHETHER NEPA PERMITS MULTIPLE CATEGORICAL EXCLUSIONS FOR SUBSTANTIAL ELEMENTS OF AN INTEGRATED PROJECT

The regulations of the Council on Environmental Quality (the "CEQ") promulgated under NEPA define "categorical exclusion" as

> a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required.

40 C.F.R. § 1508.4 (A-27). The CEQ regulations further provide:

> An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in §1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

*Id.* In implementing the CEQ regulations, the FAA adopted FAA Order 5050.4A, paragraph 23 of which lists numerous items that "are categorically excluded from the requirement for formal environmental assessment." (A-28-30).

On the authority of FAA Order 5050.4A, the FAA excluded from environmental review the following elements of the DFW Airport expansion project: (1) the new east and west passenger terminal complexes; (2) taxiway and apron improvements; (3) specific land acquisitions; (4) ground transportation improvements and AIRTRANS improvements; and (5) air traffic procedure actions above 3,000 feet AGL.[27] FEIS at 1-39 (A-34).

Noting the protests of other governmental agencies, including the EPA,[28] against the FAA's categorical exclusion of such huge elements as a new $1,000,000,000 terminal complex on the west side of the airport, the petitioners below argued that the FAA's

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[27] As noted above, the FAA used other theories to exclude other elements of the expansion project from the EIS, including: two runway extensions, highway improvements and expansions, a regional commuter rail system, new or relocated radar and navigational systems, two new air traffic control towers, and a new Doppler Weather Radar system. FEIS at 1-38-39 (A-33-35).

[28] The EPA commented: "[T]he construction of this very large $1,000,000,000 redesigned new terminal complex on the west side of the D/FW Airport and associated new expanded auto parking facilities does not fit that category [of actions that individually or cumulatively do not have a significant effect on the human environment], and we have specifically and repeatedly asked that the environmental impacts for this construction activity be assessed and included in the current Draft EIS." EPA Letter (A-53).

categorical exclusion of so many elements of the project was improper. The court below considered only the issue of whether the FAA's categorical exclusions from the EIS accorded with FAA Order 5050.4A. Regardless of whether the FAA complied with its own regulations, the result here – the "piling up" of categorical exclusions (and other exemptions), permitting most of this monumental expansion project to escape environmental review – flouts NEPA's mandate of comprehensive EISs and informed decisionmaking.

A few courts have addressed the propriety of agencies' use of categorical exclusions. In some cases, courts have upheld specific uses of categorical exclusions. *See, e.g., National Trust for Historic Preservation v. Dole*, 828 F.2d 776 (D.C. Cir. 1987); *West Houston Air Comm. v. FAA*, 784 F.2d 702 (5th Cir. 1986); *City of Alexandria v. Federal Highway Admin.*, 756 F.2d 1014 (4th Cir. 1985); *Sierra Club v. Hassell*, 636 F.2d 1095 (5th Cir. 1981); *Citizens for the Scenic Severn Bridge, Inc. v. Skinner*, 802 F. Supp. 1325 (D. Md. 1991), *aff'd*, 972 F.2d 338 (4th Cir. 1992); *Miron v. Menominee County*, 795 F. Supp. 840 (W.D. Mich. 1992). In other cases, courts have rejected specific agency uses of categorical exclusions. *See, e.g., Jones v. Gordon*, 792 F.2d 821 (9th Cir. 1986); *Mississippi ex rel. Moore v. Marsh*, 710 F. Supp. 1488 (S.D. Miss. 1989); *Greenpeace U.S.A. v. Evans*, 688 F. Supp. 579 (W.D. Wash. 1987). Each of those cases, however, concerned the propriety of a *single* categorical exclusion. None dealt with multiple categorical exclusions in the context of a comprehensive project.

The danger that categorical exclusions pose to NEPA compliance and to rational decisionmaking increases greatly with the piling up of such exclusions. Moreover, the rationale for categorical exclusions disappears with their multiplication. "By definition, [categorical exclusions] are categories of actions that have been predetermined not to involve significant environmental impacts, and therefore require no further agency analysis absent extraordinary circumstances." *National Trust for Historic Preservation v. Dole*, 828 F.2d at 781. It is difficult to see how an agency can predetermine that an undetermined combination

of an unknown number of categorically excluded actions will have no significant environmental impacts.

Here, the categorical exclusions (and other exclusions) have nearly swallowed up the environmental review of the DFW Airport expansion project. If the FAA's use of such exclusions is allowed to stand, other agencies will likely follow its practice. This Court should take this opportunity to resolve the issue of whether such practice complies with NEPA.

## CONCLUSION

For the reasons stated above, this Court should issue a writ of certiorari to the Court of Appeals for the District of Columbia Circuit in this case.

Dated: New York, New York
September 6, 1994

Respectfully submitted,

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# APPENDIX

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# APPENDIX

## Opinion of the United States Court of Appeals, Dated March 18, 1994

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Argued October 1, 1993 Decided March 18, 1994

No. 92-1151, et al.

CITY OF GRAPEVINE, TEXAS, ET AL.,
PETITIONERS

v.

DEPARTMENT OF TRANSPORTATION, ET AL.,
RESPONDENTS

DALLAS/FORT WORTH INTERNATIONAL AIRPORT BOARD,
INTERVENOR

---

Petition for Review of an Order of
the Department of Transportation

---

*Eliot R. Cutler* argued the cause for petitioners. With him on the briefs was *Perry M. Rosen*. *Peter J. Kirsch*, *Robert H. Power*, and *Christopher Caso* entered an appearance for petitioners in No. 92-1151. *Peter J. Kirsch* and *James W. Deatherage* entered an appearance for petitioner in No. 92-1158. *John Longstreth* entered an appearance for petitioners in No. 92-1247.

*Albert M. Ferlo, Jr.*, Attorney, United States Department of Justice, argued the cause for respondents. With him on the brief

was *Peter R. Steenland, Jr.*, Acting Deputy Assistant Attorney General, United States Department of Justice.

*Michael Schneiderman* argued the cause for intervenor Dallas/Fort Worth International Airport Board. With him on the brief were *Kevin E. Cox* and *Michael M. Conway*.

On the brief for *amici curiae* The Church in Dallas, The Church in Irving, and the Living Stream Ministry was *Rangely Wallace*.

On the brief for *amicus curiae* Natural Resources Defense Council was *S. Jacob Scherr*.

On the brief for *amicus curiae* National Trust for Historic Preservation in the United States was *Elizabeth S. Merritt*. *Paul W. Edmondson* and *Andrea C. Ferster* entered an appearance.

Before MIKVA, *Chief Judge*, BUCKLEY, and GINSBURG, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GINSBURG.

GINSBURG, *Circuit Judge:* Various individuals and political subdivisions of the State of Texas petition for review of the Federal Aviation Administration's decision approving a plan to expand the Dallas/Fort Worth International Airport and declaring portions of the expansion project eligible for federal funding. The petitioners contend that: (1) the FAA's categorical exclusion of some elements of the expansion project from consideration in its Final Environmental Impact Statement (FEIS) renders that document inadequate under the FAA's regulations implementing the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*; (2) the FAA failed to consider the environmental impact of all reasonable and feasible alternatives to the project, in violation of Council on Environmental Quality (CEQ) regulations implementing the NEPA; (3) the FAA erred in determining that the airport project would not "use" historic properties within the meaning of § 4(f) of the Department of Transportation (DOT) Act, 49 U.S.C. § 303(c); and (4) the FAA

violated the National Historic Preservation Act (NHPA), 16 U.S.C. § 470 *et seq.*, by issuing its Record of Decision before review under the NHPA was complete. For the reasons set forth below, we deny the petitions for review in all respects.

## I. Background

In 1988, the DFW Airport Board proposed to expand the airport and asked the FAA to fund eligible portions of the project. The Board's proposed Airport Layout Plan (ALP) contemplated the addition of two runways, two terminals, and more than 400 acres of parking, as well as cargo, hangar, maintenance, and other support facilities. Existing runways would also be expanded, while some terminals would be razed.

Under the NEPA, the FAA was required as part of its approval process to assess the environmental effects of the project. 42 U.S.C. § 4332(2)(C). Accordingly, in August 1990 the agency solicited comments on a Draft EIS (DEIS), and later (in January 1992) released the FEIS. Still later, the FAA gave "final approval" to the ALP and declared the project eligible for federal funding. *See* FAA Record of Decision, April 1992. The FAA specifically provided, however, that no expenditures for construction of the West Runway would be permitted until the review process required by the NHPA was completed. Three cities and a school district in which the airport is located, and certain owners of undeveloped property in the area, now seek review of the FEIS and of the FAA's Decision, pursuant to 49 U.S.C. § 1486.

## II. Analysis

The petitioners raise various challenges under the FAA's regulations, CEQ regulations, the DOT Act, and the NHPA.

### A. *Exclusions from the FEIS*

The NEPA requires each federal agency to consider in an EIS the environmental impact of "every recommendation or report on proposals for . . . major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

The EIS must include, among other things, a "detailed statement" describing the reasonably foreseeable environmental impact both of the proposed federal action and of any feasible alternative(s) to the proposed federal action, including non-action. 42 U.S.C. §§ 4332(2)(C)(i), (iii). Upon review of the EIS, our job is to ensure that the agency took a "hard look" at the environmental consequences of its decision to go forward with the project. *Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988).

The petitioners contend that the FEIS fails the "hard look" test. The gravamen of their argument is that the FAA improperly excluded substantial portions of the ALP from its environmental review, thereby failing to consider the full environmental impact of the project as requred under the FAA's regulations governing the proper scope of an EIS.

The FAA described the "proposed federal action" for which it prepared the FEIS as "the Federal approval and funding participation in the construction of proposed new Runway 16/34 East, scheduled to be operational in 1992, and proposed new Runway 16/34 West, scheduled to be operational in 1997, and the runway-related improvements and safety actions associated with their operation at the [DFW] Airport." The FAA determined that certain elements of the project, such as ground transportation improvements, could be categorically excluded from individualized consideration in the FEIS.

In Appendix 3 of the FEIS the FAA explained that it categorically excluded those aspects of the project under FAA Order 5050.4A ¶ 23. That regulation implements a CEQ rule, 40 C.F.R. § 1508.4, that authorizes an agency to list in advance the types of federal actions within its jurisdiction for which an Environmental Assessment (EA) or an EIS normally will not be required. The petitions do not deny that the elements that the FAA excluded in this instance are all listed in ¶ 23; rather they claim that the FAA was required to examine their effects anyway pursuant either to ¶ 24, which enumerates various characteristics that preclude exclusion under ¶ 23, or pursuant to ¶ 26, which requires consideration of "the overall cumulative

impact of the proposed action and the consequences of subsequent related actions."

1. Exceptional Circumstances Under 5050.4A ¶ 24

Paragraph 24 provides that "[p]roposed Federal actions which are normally categorically excluded but which have any of the following characteristics shall be the subject of an environmental assessment...

> a. An action that is likely to have an effect on properties protected under section 106 of the Historic Preservation Act of 1966...or use section 4(f) lands....
>
> b. An action that is likely to be highly controversial on environmental grounds. A proposed Federal action is considered highly controversial when the action is opposed on environmental grounds by a Federal, state, or local government agency or a substantial number of the persons affected by such action....
>
> c. An action that is likely to have a significant impact on natural, ecological, cultural, or scenic resources of national, state, or local significance....
>
> d. An action that is likely to be highly controversial with respect to the availability of adequate relocation housing....
>
> e. An action that is likely to...cause substantial division or disruption of an established community, or disrupt orderly, planned development or...increase surface traffic congestion....
>
> f. An action that is likely to...have a significant impact on noise levels of noise sensitive areas; [h]ave a significant impact on air or water quality or violate the local, state, or Federal standards for air quality; [or h]ave a significant impact on water quality or contaminate a public water system; or...[b]e inconsistent with any Federal, state, or local law or administrative determination relating to the environment.

> g. Other action that is likely to directly or indirectly affect human beings by creating a significant impact on the environment."

The petitioners do not claim that each excluded element, standing alone, satisfies a ¶ 24 criterion; rather, they argue more broadly that "*[t]he Expansion Project* met not just one, but most of the criteria set forth in paragraph 24." (Emphasis added.) For example, invoking ¶ 24(b) they point out that each of the petitioners opposed the airport expansion project, and that each of the petitioners as well as the Attorney General of Texas, the DOT, and the Environmental Protection Agency (EPA) submitted comments questioning the adequacy of the FAA's environmental review of the project. Presumably with ¶ 24(e) in mind, they contend that the proposed ALP would disrupt community planning that had been carried out in reliance upon an airport master plan devised in the 1970's. "In short," they say, "even the FAA's own regulations obliged it to review the entire expansion project, including all the portions it ignored as categorically excluded."

The FAA, on the other hand, maintains that the petitioners improperly aggregate the excluded elements into an "action" precluded by ¶ 24 from exclusion. According to the agency, an element that is otherwise excluded pursuant to ¶ 23—a new terminal, or the expansion of a runway, for example—is not excludable only if that element by itself meets one of the criteria of ¶ 24.

The FAA's reading of its own regulation is not unreasonable. By its terms ¶ 24 applies to "[p]roposed federal actions which are normally categorically excluded" pursuant to ¶ 23; under ¶ 23 the FAA categorically excluded from the FEIS only particular elements of the ALP. Therefore, when ¶ 24 precludes the exclusion of, for example, "[an] action that is likely to be highly controversial on environmental grounds," it refers to a specific action listed in ¶ 23 as eligible for categorical exclusion, not to the larger project of which it is but a small piece.

The petitioners' attempt to invoke the requirements of ¶ 24 because "[t]he Expansion Project" as a whole meets the criteria of that paragraph is contrary to the whole tenor of Order 5050.4A, which addresses the requirements for separately evaluating the environmental impact of particular elements. *See, e.g.*, ¶ 22a(5) (requiring an EA for "construction . . . of entrance or service road connections which adversely affect the capacity of such roads"; ¶ 23a(4) (excluding from environmental review "construction or expansion of passenger handling facilities"). For any project the environmental effects of which are significant enough to require an EIS in the first place, the petitioners' approach would negate altogether the possibility of excluding any individual element under ¶ 23. This consequence of the petitioners' interpretation only highlights the reasonableness of the FAA's interpretation of its regulation.

2. Cumulative Impact Under 5050.4A ¶ 26

Paragraph 26 of the same regulation provides generally that "[i]n determining whether an environmental impact statement is required for a proposed Federal action, it is necessary to consider the overall cumulative impact of the proposed action and consequences of subsequent related actions." The petitioners contend that the FAA granted unconditional approval to every element of the expansion project but avoided considering the cumulative impact of many of the individual elements of the project by labelling them "independent" or "speculative." The FAA points out that it did consider the environmental impact of some elements that it deemed independent or speculative when it considered the cumulative impact of categorically excluded elements of the project pursuant to ¶ 26. In any event the FAA maintains that, although it approved the ALP unconditionally, "the ability of DFW and the FAA to actually implement many of the features shown on that document is in fact conditioned on further review and analysis by the FAA," implying that any environmental impact slighted in the FEIS will be the subject of further consideration.

At several points in the FEIS, the FAA did indeed consider the cumulative impacts of categorically excluded elements of

the expansion project – upon land use, air quality, endangered and threatened species, and wetlands. The petitioners raise no challenge to the adequacy of the FAA's treatment of the cumulative impact of those excluded projects; nor do they challenge the FAA's conclusion that the cumulative impact of the excluded projects was not significant.

Our review of the FEIS suggests that the FAA considered the cumulative impact of all of the "independent" and of most if not all of the "speculative" elements that the petitioners complain were improperly excluded from consideration in the FEIS. We note, however, that certain elements that the EPA claimed in its comments on the DEIS were improperly excluded – for example, demolition of existing terminals and of a hotel – do not appear at those places in the FEIS to which the FAA points in order to show that it considered otherwise excluded elements when it assessed the cumulative impact of the project. Unless the FAA considered those elements elsewhere in the FEIS, they can not be deemed part of the approved ALP insofar as the FAA's duties under the NEPA are concerned. In other words, if the FAA determined that review of an element of the ALP would have been premature when it was considering the cumulative impact of the project in the FEIS, then such review must be done when the matter is no longer too speculative to warrant it.

B. *Consideration of Alternatives*

According to the CEQ, the "heart" of an EIS should be the agency's presentation of "the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." 40 CFR § 1502.14. The range of alternatives that the agency must consider is not infinite, of course, but it does include all "feasible" or "reasonable" alternatives to the proposed action. 40 CFR §§ 1502.14(a)-(c), 1508.25(b)(2). This "rule of reason governs 'both *which* alternatives the agency must discuss, and the *extent* to which it must discuss them.'" *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991) (emphases in original).

The petitioners argue that the FAA improperly curtailed its consideration of alternatives by the way in which it stated the purpose of the airport expansion project. In the DEIS, the FAA said that the purpose of the project was to meet increased demand at the DFW Airport; thus it considered only alternative runway configurations at the airport itself. In their comments on the DEIS, the EPA, the DOT, and the Attorney General of Texas criticized the FAA for failing to consider alternatives off the DFW Airport site. In the FEIS, the FAA described the purposes of the project to include economic development of the Dallas/Fort Worth area and meeting national and international demand for a hub airport. It briefly considered and rejected off-site alternatives to the expansion plan, including construction of a new regional airport and construction of a "wayport" facility designed to handle only connecting traffic. The agency concluded that neither a new airport nor a wayport could be completed in time to alleviate problems at the DFW Airport, and that a wayport, which is as yet an unproven concept, could also be detrimental to the level of non-stop and international service to the DFW Airport. As the only "viable alternatives" to the proposed plan, therefore, the different possible runway configurations were addressed in more detail.

First, the petitioners (and some of the amici) argue that it was improper for the FAA, in defining the purpose of the project, to consider the economic goals of the project's sponsor, the DFW Airport Board. This argument is foreclosed, however, by our decision in *Citizens Against Burlington:* Per then-Judge Thomas, where a federal agency is not the sponsor of a project, "the Federal government's consideration of alternatives may accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project." 938 F.2d at 197-98. In formulating the EIS requirement, the "Congress did not expect agencies to determine for the applicant what the goals of the applicant's proposal should be." *Id.* at 199. While it is not clear whether federal funds were committed to the project in *Citizens Against Burlington*, we see no basis for holding that where, as here, federal funds would be involved – assuming the project passes environmental muster – the agency may not consider the sponsor's goals to the same extent. Therefore, we

conclude that the FAA's statement of the purpose of the airport expansion project did not improperly constrain its consideration of alternatives in the FEIS.

Second, the petitioners contend that the FAA, in response to criticism of the scope of the alternatives it considered in the DEIS, merely "manipulate[d] the statements of need and purpose to avoid considering any alternatives except for those that achieve what has been the FAA's unmistakable goal from day one—the expansion of DFW Airport." We pass over the facile implication that the FAA harbored an improper motive for changing the statement of purpose in the FEIS. The very purpose of a DEIS is to elicit suggestions for change. The resulting FEIS must be evaluated for what it is, not for why the drafter may have made it so. Here the record shows that the FAA gave reasoned consideration to off-site alternatives to the proposed project. Therefore, we can not hold that the FAA failed to take a "hard look" at the environmental impact of the alternatives to the project. *Hodel*, 865 F.2d at 294.

C. *Noise Measurement Metholodogy*

Section 4(f) of the DOT Act, 49 U.S.C. § 303 (1983), makes it "the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites." Accordingly, § 303(c) provides:

> The Secretary [of Transportation] may approve a transportation program or project requiring the use... of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance... only if—
>
> (1) there is no prudent and feasible alternative to using that land; and
>
> (2) the program or project includes all possible planning to minimize harm to the park, recreation area,

> wildlife and waterfowl refuge, or historic site resulting from the use.

For the purpose of § 4(f), noise that is inconsistent with a parcel of land's continuing to serve its recreational, refuge, or historical purpose is a "use" of that land. *Allison v. United States DOT*, 908 F.2d 1024, 1028 (D.C. Cir. 1990).

The FAA, applying its standard "Part 150" noise measurement technique, as set forth at Appendix A to 14 C.F.R. § 150, found that the protected areas—viz., parks and historic sites—potentially affected by the DFW Airport expansion would not be "used" within the meaning of § 4(f). The Part 150 guidelines rely upon weighted average day and night sound level measurements (so-called Ldn) "for the analysis and characterization of multiple aircraft noise events and for determining the cumulative exposure of individuals to noise around airports." 14 C.F.R. Pt. 150, App. A. § A150.3(b). The guidelines provide that a recreational area is "used" by noise at a level of 70 to 75 Ldn. There is no guideline specifically for historic sites in Part 150. As it turns out, however, all the historic sites at issue in this case are in fact residential properties, and the FAA therefore used the guideline for residences, which is 65 Ldn. *Id.* at App. A Table 1.

The petitioners argue that use of the Part 150 guidelines is inappropriate because they were not designed for the purpose of § 4(f) but in connection with other types of land use and funding decisions. They also contend that it was arbitrary and capricious for the FAA not to rely upon indicators measuring the intensity of single noise events, or upon "a computer simulation technique" that "replicate[s] the aircraft noise that people actually will hear."

As set forth in its Decision, the FAA takes the position that the Ldn system is the "best measure of noise exposure to identify significant impact on the quality of the human environment and is the only noise metric with a substantial body of scientific data on the reactions of people to noise." This court has previously deferred to the agency's expertise in choosing the

appropriate way to measure noise; indeed we have specifically approved the FAA's use of the Ldn metric. *See Sierra Club v. DOT*, 753 F.2d 120, 128 (D.C. Cir. 1985); *Citizens Against Burlington*, 938 F.2d at 201. The petitioners offer no distinction upon which we could withhold our approval in this case.

Furthermore, we note that in 1990 the EPA and the FAA undertook a joint study of noise measurement methodology, and that pending the completion of their study the FAA agreed to include a single event noise analysis in its assessment of impacts at a number of airport projects, including the DFW Airport expansion project. Accordingly, although the FAA's noise analysis in this case "was primarily based upon the development of Ldn contours," in considering the environmental effect of noise caused by the expansion project the agency also "estimat[ed] levels of annoyance, conduct[ed] a time-above threshold analysis, determin[ed] single-event noise levels and evaluat[ed] the potential noise impacts of airspace actions occurring at altitudes of up to 18,000 feet above ground level." In view of our prior decisions, and of the FAA's ongoing cooperation with the EPA to study different methods of evaluating noise pollution, the agency's "primary reliance" upon the Ldn metric in this case was surely neither arbitrary nor capricious.

The petitioners also challenge the FAA's application to historic sites of the Part 150 standard for "residential properties." As they point out, we have previously noted that "while it is reasonable for the agency to rely on guidelines in determining whether a 'use' of section 4(f) lands has occurred, [the standard used] must bear some relevance to the value, significance, and enjoyment of the lands at issue." *Allison v. DOT*, 908 F.2d at 1029. In that case we held that the DOT could not apply the standard for "recreational parks," which include amusement parks and recreational waters, to determine whether airport noise would constructively use a wildlife preserve, the purpose of which is to provide "tranquility and the opportunity to observe nature undisturbed by human activity." *Id.*

In this case the historic sites at issue are in daily use as "residential properties." There might well be instances in which the 65

Ldn standard for residential properties would be inadequate to protect the particular values that led to the designation of a site as historic. Consider, for example, a village preserved specifically in order to convey the atmosphere of rural life in an earlier (and presumably a quieter) century. *Cf. Communities, Inc. v. Busey*, 956 F.2d 619, 624 (6th Cir. 1992) (suggesting no § 4(f) use because "noise would not affect the relevant characteristics of [an historic neighborhood]—its architecture and its place in history"). There is no reason, however, to believe that the use standard applicable to a private home is inapposite merely because the home is historic. Therefore, we uphold in all respects the noise measurement methodology that the FAA used in this case.

D. *Conditional Approval of the West Runway*

The petitioners and the National Trust for Historic Preservation, amicus, argue that the FAA unlawfully approved the proposed West Runway before completion of the review process required by the NHPA, 16 U.S.C. §§ 470-470w. That Act requires each federal agency to take responsibility for the impact that its activities may have upon historic resources, and establishes the Advisory Council on Historic Preservation (ACHP) to administer the Act. Section 470f (Title I, Section 106) requires that:

> The head of any Federal agency . . . shall, prior to the approval of the expenditure of any Federal funds on the undertaking . . . take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register [of Historic Places]. The head of any such Federal agency shall afford the [ACHP] . . . a reasonable opportunity to comment with regard to such undertaking.

Under the regulations of the ACHP, the federal agency must, in consultation with the relevant State Historic Preservation Officer, identify the project's "area of potential effect," locate all historic properties in that area, and assess the actual effect of the project upon those specific properties. 36 C.F.R. §§ 800.4(b),

800.4(c), 800.5. If the agency determines that the project will have no adverse effect upon any historic property, then the ACHP may either agree with such a finding or object and propose changes. If the agency does not accept the ACHP's changes, then the ACHP will itself enter a finding of adverse effect. *Id.* at § 800.5(d)(2). The agency, the ACHP, and the State Historic Preservation Officer are then to consult in order to "seek ways to avoid or reduce" the adverse effect. § 800.5(e).

In its Decision the FAA conditioned final approval of the West Runway upon its subsequent reevaluation, pursuant to Order 5050.4A, of the runway's impact; the agency specifically noted that as part of that reevaluation it would "take into account the conclusions and recommendations arising out of the consultation process required by Section 106" of the NHPA. Seven months later (in November 1992) the FAA transmitted to the Texas Historical Commission its final assessment of the effects of the West Runway. After a further six-month period of deliberation the FAA, the Texas Historical Commission, and the DFW Airport Board entered into an agreement finding that there would be no adverse effect within the meaning of the NHPA, and submitted that finding to the ACHP. The ACHP then informed the FAA that it disagreed with the finding and that it wished to consult with the FAA about alternatives and mitigation measures.

Throughout these events the FAA followed the procedure prescribed by the ACHP's regulations. Much of the relevant activity, however, took place after the FAA had issued its Decision. Although it is of course desirable for the § 106 process to occur as early as possible in a project's planning stage, we do not agree with the petitioners that in this case the FAA's conditional approval of the West Runway violated any requirement of the NHPA. Merely by issuing its Decision the FAA did not "approv[e] the expenditure of any Federal funds" for the runway. Recall that the FAA is not the sponsor of the airport project; if the DFW Airport Board commits its own resources to the West Runway – for further planning, engineering, or what have you short of construction – although the runway was only conditionally approved, then it does so at the risk of losing its

investment should the § 106 process later turn up a significant adverse effect and the FAA withdraw its approval. In sum, because the FAA's approval of the West Runway was expressly conditioned upon completion of the § 106 process, we find here no violation of the NHPA.

## III. Conclusion

The scope of the FEIS and of the alternatives that the FAA considers therein demonstrate that the agency took a "hard look" at the DFW Airport expansion project and fully complied with its own and the CEQ's regulations implementing the NEPA. The FAA's primary reliance upon its established Ldn noise measurement methodology for the purpose of determining whether the project would "use" any historic property within the meaning of § 4(f) of the DOT Act was not arbitrary or capricious. Nor do we find a violation of the NHPA in the FAA's conditional approval of the West Runway pending completion of the consultations required by § 106 of that Act. For these reasons, the petitions for review are

*Denied.*

**Order of the Court of Appeals Denying Petition for Rehearing, Dated May 9, 1994**

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-1151 September Term, 1993

City of Grapevine, Texas,
City of Euless, Texas, and
City of Irving, Texas,

Petitioners

v.

Department of Transportation; Andrew H. Card, Department of Transportation, in his official capacity; Federal Aviation Administration and Barry Lambert Harris, Acting Administrator of the Federal Aviation Administration, in his official capacity,

Respondents

and Consolidated Cases

BEFORE: Mikva, Chief Judge; Buckley and Ginsburg, Circuit Judges

*ORDER*

Upon consideration of petitioners' Petition for Rehearing and the brief in support thereof, it is

ORDERED, by the Court, that the petition is denied.

*Per Curiam*
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/ Robert A. Bonner

Robert A. Bonner
Deputy Clerk

Judgment of the Court of Appeals, Dated November 19, 1993

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-1151 September Term, 1993

City of Grapevine, Texas, et al.,

Petitioners

v.

Department of Transportation, et al.,

Respondents

and consolidated cases 92-1158 and 92-1247

PETITIONS FOR REVIEW OF AN ORDER OF THE FEDERAL AVIATION ADMINISTRATION

BEFORE: Mikva, *Chief Judge*, Buckley and Ginsburg, *Circuit Judges*.

*JUDGMENT*

These causes came on to be heard on the petitions for review of an order of the Federal Aviation Administration and were argued by counsel. On consideration thereof, it is

ORDER and ADJUDGED, by the Court, that the petitions for review are denied.

An Opinion of the Court will issue at a later date.

*Per Curiam*
FOR THE COURT:

/s/ Ron Garvin

RON GARVIN, CLERK

Date: November 19, 1993

## Section 106 of the National Historic Preservation Act

### § 470f. Effect of Federal undertakings upon property listed in National Register; comment by Advisory Council on Historic Preservation

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under part B of this subchapter a reasonable opportunity to comment with regard to such undertaking.

## Excerpts

## Regulations of the Advisory Council on Historic Preservation, 36 C.F.R. §§ 800.4-.6

### § 800.4 Identifying historic properties.

(a) *Assessing information needs.* (1) Following a determination by the Agency Official that a proposed project, activity, or program constitutes an undertaking and after establishing the undertaking's area of potential effects, the Agency Official shall:

(i) Review existing information on historic properties potentially affected by the undertaking, including any data concerning the likelihood that undentified historic properties exist in the area of potential effects;

(ii) Request the views of the State Historic Preservation Officer on further actions to identify historic properties that may be affected; and

(iii) Seek information in accordance with agency planning processes from local governments, Indian tribes, public and private organizations, and other parties likely to have knowledge of or concerns with historic properties in the area.

(2) Based on this assessment, the Agency Official should determine any need for further actions, such as field surveys and predictive modeling, to identify historic properties.

(b) *Locating historic properties.* In consultation with the State Historic Preservation Officer, the Agency Official shall make a reasonable and good faith effort to identify historic properties that may be affected by the undertaking and gather sufficient information to evaluate the eligibility of these properties for the National Register. Efforts to identify historic properties should follow the Secretary's "Standards and Guidelines for Archeology and Historic Preservation" (48 FR 44716) and agency programs to meet the requirements of section 110(a)(2) of the Act.

(c) *Evaluating historical significance.* (1) In consultation with the State Historic Preservation Officer and following the Secretary's Standards and Guidelines for Evaluation, the Agency Official shall apply the National Register Criteria to properties that may be affected by the undertaking and that have not been previously evaluated for National Register eligibility. The passage of time or changing perceptions of significance may justify reevaluation of properties that were previously determined to eligible or ineligible.

(2) If the Agency Official and the State Historic Preservation Officer agree that a property is eligible under the criteria, the property shall be considered eligible for the National Register for section 106 purposes.

(3) If the Agency Official and the State Historic Preservation Officer agree that the criteria are not met, the property shall be considered not eligible for the National Register for section 106 purposes.

(4) If the Agency Official and the State Historic Preservation Officer do not agree, or if the Council or the Secretary so request, the Agency Official shall obtain a determination from the Secretary of the Interior pursuant to the applicable National Park Service regulations.

(5) If the State Historic Preservation Officer does not provide views, then the State Historic Preservation Officer is presumed to agree with the Agency Official's determination for the purpose of this subsection.

(d) *When no historic properties are found.* If the Agency Official determines in accordance with § 800.4 paragraphs (a) through (c) that there are no historic properties that may be affected by the undertaking, the Agency Official shall provide documentation of this finding to the State Historic Preservation Officer. The Agency Official should notify interested persons and parties known to be interested in the undertaking and its possible effects on historic properties and make the documentation available to the public. In these circumstances, the Agency

Official is not required to take further steps in the section 106 process.

(e) *When historic properties are found.* If there are historic properties that the undertaking may affect, the Agency official shall assess the effects in accordance with § 800.5.

§ 800.5 Assessing effects.

(a) *Applying the Criteria of Effect.* In consultation with the State Historic Preservation Officer, the Agency Official shall apply the Criteria of Effect (§ 800.9(a)) to historic properties that may be affected, giving consideration to the views, if any, of interested persons.

(b) *When no effect is found.* If the Agency Official finds the undertaking will have no effect on historic properties, the Agency Official shall notify the State Historic Preservation Officer and interested persons who have made their concerns known to the Agency Official and document the findings, which shall be available for public inspection. Unless the State Historic Preservation Officer objects within 15 days of receiving such notice, the Agency Official is not required to take any further steps in the section 106 process. If the State Historic Preservation Officer files a timely objection, then the procedures described in § 800.5(c) are followed.

(c) *When an effect is found.* If an effect on historic properties is found, the Agency Official, in consultation with the State Historic Preservation Officer, shall apply the Criteria of Adverse Effect (§ 800.9(b)) to determine whether the effect of the undertaking should be considered adverse.

(d) *When the effect is not considered adverse.* (1) If the Agency Official finds the effect is not adverse, the Agency Official shall:

(i) Obtain the State Historic Preservation Officer's concurrence with the finding and notify and submit to the Council summary documentation, which shall be available for public inspection; or

(ii) Submit the finding with necessary documentation (§ 800.8(a)) to the Council for a 30-day review period and notify the State Historic Preservation Officer.

(2) If the Council does not object to the finding of the Agency Official within 30 days of receipt of notice, or if the Council objects but proposes changes that the Agency Official accepts, the Agency Official is not required to take any further steps in the section 106 process other than to comply with any agreement with the State Historic Preservation Officer or Council concerning the undertaking. If the Council objects and the Agency Official does not agree with changes proposed by the Council, then the effect shall be considered adverse.

(e) *When the effect is adverse.* If an adverse effect on historic properties is found, the Agency Official shall notify the Council and shall consult with the State Historic Preservation Officer to seek ways to avoid or reduce the effects on historic properties. Either the Agency Official or the State Historic Preservation Officer may request the Council to participate. The Council may participate in the consultation without such a request.

(1) *Involving interested persons.* Interested persons shall be invited to participate as consulting parties as follows when they so request:

(i) The head of a local government when the undertaking may affect historic properties within the local government's jurisdiction;

(ii) The representative of an Indian tribe in accordance with § 800.1(c)(2)(iii);

(iii) Applicants for or holders of grants, permits, or licenses, and owners of affected lands; and

(iv) Other interested persons when jointly determined appropriate by the Agency Official, the State Historic Preservation Officer, and the Council, if participating.

(2) *Documentation.* The Agency Official shall provide each of the consulting parties with the documentation set forth in § 800.8(b) and such other documentation as may be developed in the course of consultation.

(3) *Informing the public.* The Agency Official shall provide an adequate opportunity for members of the public to receive information and express their views. The Agency Official is encouraged to use existing agency public involvement procedures to provide this opportunity. The Agency Official, State Historic Preservation Officer, or the Council may meet with interested members of the public or conduct a public information meeting for this purpose.

(4) *Agreement.* If the Agency Official and the State Historic Preservation Officer agree upon how the effects will be taken into account, they shall execute a Memorandum of Agreement. When the Council participates in the consultation, it shall execute the Memorandum of Agreement along with the Agency Official and the State Historic Preservation Officer. When the Council has not participated in consultation, the Memorandum of Agreement shall be submitted to the Council for comment in accordance with § 800.6(a). As appropriate, the Agency Official, the State Historic Preservation Officer, and the Council, if participating, may agree to invite other consulting parties to concur in the agreement.

(5) *Amendments.* The Agency Official, the State Historic Preservation Officer, and the Council, if it was a signatory to the original agreement, may subsequently agree to an amendment to the Memorandum of Agreement. When the Council is not a party to the Memorandum of Agreement, or the Agency Official and the State Historic Preservation Officer cannot agree on changes to the Memorandum of Agreement, the proposed changes shall be submitted to the Council for comment in accordance with § 800.6.

(6) *Ending consultation.* The Council encourages Agency Officials and State Historic Preservation Officers to utilize the consultation process to the fullest extent practicable. After initiating

consultation to seek ways to reduce or avoid effects on historic properties, State Historic Preservation Officer, the Agency Official, or the Council, at its discretion, may state that further consultation will not be productive and thereby terminate the consultation process. The Agency Official shall then request the Council's comments in accordance with § 800.6(b) and notify all other consulting parties of its requests.

**§ 800.6 Affording the Council an opportunity to comment.**

(a) *Review of a Memorandum of Agreement.* (1) When an Agency Official submits a Memorandum of Agreement accompanied by the documentation specified in § 800.8 (b) and (c), the Council shall have 30 days from receipt to review it. Before this review period ends, the Council shall:

(i) Accept the Memorandum of Agreement, which concludes the section 106 process, and informs all consulting parties; or

(ii) Advise the Agency Official of changes to the Memorandum of Agreement that would make it acceptable; subsequent agreement by the Agency Official, the State Historic Preservation Officer, and the Council concludes the section 106 process; or

(iii) Decide to comment on the undertaking, in which case the Council shall provide its comments within 60 days of receiving the Agency Official's submission, unless the Agency Official agrees otherwise.

(2) If the Agency Official, the State Historic Preservation Officer, and the Council do not reach agreement in accordance with § 800.6(a)(1)(ii), the Agency Official shall notify the Council, which shall provide its comments within 30 days of receipt of notice.

(b) *Comment when there is no agreement.* (1) When no Memorandum of Agreement is submitted, the Agency Official shall request Council comment and provide the documentation specified in § 800.8(d). When requested by the Agency Official, the Council shall provide its comments within 60 days of receipt of the Agency Official's request and the specified documentation.

(2) The Agency Official shall make a good faith effort to provide reasonably available additional information concerning the undertaking and shall assist the Council in arranging an onsite inspection and public meeting when requested by the Council.

(3) The Council shall provide its comments to the head of the agency requesting comment. Copies shall be provided to the State Historic Preservation Officer, interested persons, and others as appropriate.

(c) *Response to Council comment.* (1) When a Memorandum of Agreement becomes final in accordance with § 800.6(a)(1)(i) or (ii), the Agency Official shall carry out the undertaking in accordance with the terms of the agreement. This evidences fulfillment of the agency's section 106 responsibilities. Failure to carry out the terms of a Memorandum of Agreement requires the Agency Official to resubmit the undertaking to the Council for comment in accordance with § 800.6.

(2) When the Council had commented pursuant to § 800.6(b), the Agency Official shall consider the Council's comments in reaching a final decision on the proposed undertaking. The Agency Official shall report the decision to the Council, and if possible, should do so prior to initiating the undertaking.

(d) *Foreclosure of the Council's opportunity to comment.* (1) The Council may advise an Agency Official that it considers the agency has not provided the Council a reasonable opportunity to comment. The decision to so advise the Agency Official will be reached by a majority vote of the Council or by a majority vote of a panel consisting of three or more Council members with the concurrence of the Chairman.

(2) The Agency Official will be given notice and a reasonable opportunity to respond prior to a proposed Council determination that the agency has foreclosed the Council's opportunity to comment.

(e) *Public requests to the Council.* (1) When requested by any person, the Council shall consider an Agency Official's finding under §§ 800.4(b), 800.4(c), 800.4(d), or 800.5(b), and, within

30 days of receipt of the request, advise the Agency Official, the State Historic Preservation Officer, and the person making the request of its views of the Agency Official's finding.

(2) In light of the Council views, the Agency Official should reconsider the finding. However, an inquiry to the Council will not suspend action on an undertaking.

(3) When the finding concerns the eligibility of a property for the National Register, the Council shall refer the matter to the Secretary.

[51 FR 31118, Sept. 2, 1986; 52 FR 25376, July 7, 1987]

## Excerpt

## Regulations of the Council on Environmental Quality
## 40 C.F.R. § 1508.4

### § 1508.4 Categorical exclusion.

*Categorical exclusion* means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

## Excerpts

## Federal Aviation Administration Order 5050.4A, ¶¶ 23-24

23. *CATEGORICAL EXCLUSIONS.*

a. Unless specifically covered by paragraphs 21, 22, 24, or 26, the items below are categorically excluded from the requirement for formal environmental assessment. Paragraphs 21 and 22 identify specific airport actions such as major runway extensions which require, as a minimum, an environmental assessment. Paragraph 24 identifies extraordinary circumstances which create a requirement for environmental assessment of actions otherwise excluded. Paragraph 26 deals with cumulative impact. For any of the following specific items, paragraphs 21, 22, 24, and 26 shall be reviewed.

(1) Runway, taxiway, apron, or loading ramp construction or repair work including extension, strengthening, reconstruction, resurfacing, marking, grooving, fillets and jet blast facilities, and new heliports on existing airports, except where such action will create environmental impacts off airport property.

(2) Installation or upgrading of airfield lighting systems, including runway end identification lights, visual approach aids, beacons and electrical distribution systems.

(3) Installation of miscellaneous items including segmented circles, wind or landing direction indicators or measuring devices, or fencing.

(4) Construction or expansion of passenger handling facilities.

(5) Construction, relocation or repair of entrance and service roadway.

(6) Grading or removal of obstructions on airport property and erosion control actions with no off-airport impacts.

(7) Landscaping generally, and landscaping or construction of physical barriers to diminish impact of airport blast and noise.

(8) Projects to carry out noise compatibility programs.

(9) Land acquisition and relocation associated with any of the above items.

(10) Federal release of airport land (see paragraph 35).

(11) Removal of a displaced threshold.

(b) The following items are not subject to the paragraphs listed in a. above and are categorically excluded:

(1) Acquisition of an existing privately owned airport, as long as acquisition only involves change of ownership.

(2) Acquisition of: security equipment required by rule or regulation for the safety or security of personnel and property on the airport (14 CFR Part 107), safety equipment required by rule or regulation for certification of an airport (14 CFR Part 139) or snow removal equipment.

(3) Issuance of airport planning grants.

(4) Airport Improvement Program actions which are tentative and conditional and clearly taken as a preliminary action to establish a sponsor's eligibility under the Program.

(5) Retirement of the principal of bond or other indebtedness for terminal development.

(6) Issuance of airport policy and planning documents including the National Plan of Integrated Airport Systems (NPIAS), Airport Improvement Program (AIP) priority system, advisory circulars on planning, design, and development programs which are not intended for direct implementation or which are issued by FAA as administrative and technical guidance to the public.

(7) Issuance of certificates and related actions under the Airport Certification Program (14 CFR Part 139).

(8) Issuance of grants for preparation of noise exposure maps and noise compatibility programs per sections 103(a) and 104(a) of the Aviation Safety and Noise Abatement Act of 1979 and 14 CFR Part 150 determinations on noise exposure maps and approval of noise compatibility programs.

(9) Airspace determinations (see paragraph 25, Advisory Actions).

24. *EXTRAORDINARY CIRCUMSTANCES.* Proposed Federal actions which are normally categorically excluded but which have any of the following characteristics shall be the subject of an environmental assessment. The FAA will determine, in accordance with paragraph 51, whether the action will be the subject of an environmental impact statement or finding of no significant impact.

a. An action that is likely to have an effect on properties protected under section 106 of the Historic Preservation Act of 1966, as amended, or use section 4(f) lands (see paragraphs 47e(8) and 47e(7), respectively), or involve acquisition and conversion of farmland scoring over 160 on Form AD-1006 and protected under the FPPA to nonagricultural use through Federal financial assistance or through conveyance of government land (paragraph 47e(16)).

b. An action that is likely to be highly controversial on environmental grounds. A proposed Federal action is considered highly controversial when the action is opposed on environmental grounds by a Federal, state, or local government agency or by a substantial number of the persons affected by such action. If the responsible official has any doubt whether a given number of opposing persons is "substantial," that doubt shall be resolved by discussion with APP-600 to determine if the action should be processed as a highly controversial one.

c. An action that is likely to have a significant impact on natural, ecological, cultural, or scenic resources of national,

state, or local significance (refer to appropriate subparagraphs under 47e, Chapter 5).

d. An action that is likely to be highly controversial with respect to the availability of adequate relocation housing. In an action involving relocation of persons or businesses, a controversy over the amount of the acquisition or relocation payments is not considered to be a controversy with respect to availability of adequate relocation housing.

e. An action that is likely to:

(1) Cause substantial division or disruption of an established community, or disrupt orderly, planned development, or is likely not to be reasonably consistent with plans or goals that have been adopted by the community in which the project is located; or

(2) Cause a significant increase in surface traffic congestion.

f. An action that is likely to:

(1) Have a significant impact on noise levels of noise sensitive areas;

(2) Have a significant impact on air quality or violate the local, state, or Federal standards for air quality;

(3) Have a significant impact on water quality or contaminate a public water supply system; or

(4) Be inconsistent with any Federal, state, or local law or administrative determination relating to the environment.

g. Other action that is likely to directly or indirectly affect human beings by creating a significant impact on the environment.

**Excerpt**

**Final Environmental Impact Statement, December 1991, pp. 1-38, 1-39**

## 1.7 ENVIRONMENTAL EVALUATION PROCESS

This section provides a brief summary of the FAA environmental evaluation process and explains how the proposed D/FW Airport improvements are examined. A detailed discussion is provided in Appendix 3, in Volume II of this EIS.

### *1.7.1 FAA ENVIRONMENTAL PROCESS*

All airport improvement projects which are considered to be Federal actions or which receive Federal funding must be examined from an environmental standpoint in order to comply with the National Environmental Policy Act of 1969 (NEPA), the Airport and Airway Improvement Act of 1982 and other pertinent laws. Guidance in the FAA's consideration of environmental impacts is provided in Order 1050.1D, *Policies and Procedures for Considering Environmental Impacts;* Order 5050.4A, *Airport Environmental Handbook,* as well as the Council on Environmental Quality's *Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act,* found at 40 CFR 1500-1508.

On any proposed airport action, the FAA performs an initial environmental determination that considers the type of action and its potential effect upon the environment. The result of the determination is the selection of one of three environmental processes:

- ★ **An Environmental Impact Statement (EIS) is prepared for major Federal actions which are generally known to have the potential for significant environmental impacts. An EIS involves thorough evaluation and documentation of a proposed action's purpose and need, alternatives, affected environment and environmental**

consequences. The study requires coordination with involved Federal, state and local agencies and the public.

★ An **Environmental Assessment** (EA) is prepared for proposed actions with expected minor or uncertain environmental impact potential. An EA requires similar analysis and documentation as an EIS but with somewhat less detail and coordination. Depending upon whether or not certain environmental thresholds of significance are exceeded, an EA will either lead to a Finding of No Significant Impact (FONSI) or require the preparation of an EIS.

★ A proposed action may be considered a **Categorical Exclusion** (CE) by the FAA if it is the kind of action that typically, according to FAA guidelines, does not result in significant environmental impacts and for which an EA or EIS is not required. The CE may require a brief documentation of the project's description and environmental impact potential in order to support its processing as a CE.

### *1.7.2 FAA'S ENVIRONMENTAL DETERMINATIONS FOR D/FW AIRPORT IMPROVEMENTS*

The FAA has reached the following environmental determination:

★ As indicated in Section 1.1, this **Environmental Impact Statement** (EIS) is prepared for proposed new Runway 16/34 East, or new Runway 16/34 West, or both, and other improvements associated with their operation.

★ **Environmental Assessments** have been or will be prepared for a variety of measures not included in the EIS related to air traffic control, navigational aids and airspace procedures but not

connected with these proposals. These include new or relocated radar and navigational systems, two new air traffic control towers, and a new Doppler Weather Radar system. These assessments are further described in Appendix 3, in Volume II of this EIS.

★ Several proposed D/FW Airport actions are considered to be **Categorical Exclusions.** These include the new east and west terminal complexes, miscellaneous taxiway and apron improvements, some specific land acquisitions, ground transportation improvements and AIRTRANS improvements, and air traffic procedure actions above 3,000 feet AGL, as proposed in the D/FW Metroplex Air Traffic System Plan. Although these actions are considered to be categorically excluded (Appendix 3 of Volume II), the potential *cumulative* impacts of these actions and the proposed new runway development actions have been considered in Section 4.4 of Volume I (Environmental Consequences) of this document. In addition, while normally categorically excluded, the impacts of air traffic procedure actions above 3,000 feet AGL have been evaluated (see Appendix 15 in Volume II).

★ The proposed extensions of existing Runways 18L/36R and 17R/35L and associated actions have been examined for potential environmental impact in a **Technical Reevaluation of the 1974 Environmental Impact Statement.** Both of these runways are proposed to be extended 2,000 feet to the north, resulting in total runway lengths of 13,388 feet. These improvements, which had been recommended when the airport was first developed, were re-examined in 1990 using the process of tiering, due to the time that had elapsed since their initial approval. The written reevaluation was approved by the FAA on June 13, 1990. The construction of

the extension of Runway 17R/35L is expected to be initiated in late 1991. The construction of the extension of Runway 18L/36R is planned to start in 1993 after the Runway 17R/35L extension is complete. This EIS evaluates the impacts from those runway extensions as if they have been completed. For example, the noise contours that were developed for all alternatives include the extended runways in the analysis and, therefore, reflect the cumulative noise impacts in this statement.

★ Other proposed Federal transportation actions in the vicinity of D/FW Airport have been examined by Federal agencies other than the FAA. These include the environmental impacts from the proposed construction of roadway improvements to SH 161 and SH 360, east and west of the airport, respectively, which have been examined by the Federal Highway Administration. They also include the development of a regional commuter rail system with access to D/FW Airport, which is being assessed by the Urban Mass Transit Administration.

The cumulative impacts of all applicable development actions have been considered and are provided in Section 4.4 of this volume.

Excerpts
Record of Decision, April 6, 1992, pp. 1, 42-43, 72-74

## *CHAPTER 1 DECISION*

Based on a review of the administrative record, including the Final Environmental Impact Statement (FEIS) approved on December 30, 1991, it is the Federal Aviation Administration's (FAA) final determination that the revised Airport Layout Plan (ALP), which incorporates two new air carrier length runways specifically described in Chapters 3 and 5 of this Record of Decision (ROD), and identified in the FEIS as the "Preferred Alternative Combined (PAC)," is approved. These runways are designated, for planning purposes, as 16/34 East and 16/34 West. In addition, both runways are approved as eligible for federal financial assistance. The East runway is also approved for construction. It is further determined that these approvals for both runways offer the environmentally preferable alternative for development, in light of the technical and aeronautical needs at Dallas/Fort Worth International Airport (D/FW Airport).

While these approvals of the Airport Layout Plan and eligibility for federal funding constitute final approval, the agency has determined at this time that the approval of Runway 16/34 West will prohibit the actual expenditure of any funds or the commencement of runway construction until there is a written reevaluation of the West runway pursuant to FAA Order 5050.4A. This evaluation will either conclude that the contents of the FEIS and this ROD remain valid or that significant changes require the preparation of a supplement or a new environmental document. As part of that reevaluation, the agency will take into account the conclusions and recommendations arising out of the consultation process required by Section 106 of the National Historic Preservation Act, particularly including the impact of the noise mitigation program on historic properties in the city of Grapevine. In addition, these approvals are premised on the fact that construction of the West runway will not commence until 1995, and that the runway will not be utilized until 1997, unless reevaluated and approved for construction and use earlier.

The FAA notes that the project sponsor has agreed to the various conditions of approval, in particular the conditions requiring mitigation measures.

In reaching this determination, careful consideration has been given to the needs of: (a) D/FW Airport as a part of the national air transportation system and the airport capacity/delay reduction needs through the year 2010; (b) the aviation safety and operational objectives of the project in the light of the various aeronautical factors and judgments presented; and (c) the anticipated environmental impacts of the project.

A discussion of the leading factors considered by the agency in reaching this decision follows.

* * * * *

*Historic Sites*

In addition to the regulations of the Advisory Council on Historic Preservation (ACHP) found at 36 CFR 800, the FAA also used the ACHP booklet entitled *Section 106, Step-by-Step,* issued October 1986, in considering impacts on historic sites.

There is "no effect" on historic properties as a result of the project for the East Runway (16/34 East), and in accordance with FAA policies, no further analysis under Section 106 is required and a DOT Section 4(f) statement is not required.

There is "no adverse effect" on historic properties as a result of the West Runway (16/34 West) project and, consequently, a DOT Section 4(f) Statement is not required, subject to the following considerations:

- This runway project is approved for the revised Airport Layout Plan and is eligible for a federal-aid grant agreement, but not for the commencement of construction or actual expenditure of any federal funds (which will be special conditions in any grant agreement issued), until the Section 106 process has

been completed with respect to two issues: the identification of future possible eligible historic sites in Grapevine as defined in the FEIS; and an assessment of whether the noise mitigation program has any further impact on these properties. In fact, commencement of construction cannot proceed prior to the completion of the Section 106 process, even if the project should be funded without federal funds.

- Approval of the revised ALP and a finding of eligibility with no expenditure of funds is consistent with the Advisory Council on Historic Preservation (ACHP) principle of "phased compliance" [see 36 CFR 800.3(c)].

- The requirement to continue with the Section 106 consultative process stems from a need to complete the determination of eligible properties within the area of potential effect in Grapevine on the West side and to assess any possible impact from the mitigation program on them.

- Detailed studies conducted to date show no adverse impacts from the project on those properties studied (identified on Figures 4.4 and 4.5 in Appendix 22 of the FEIS), which include eligible and potentially eligible properties, because these properties are all included within the noise mitigation program. However, there is a possibility that the agency's noise mitigation program may have some effect in that if homeowners, who participate in either the EAP or SGP, do not follow the Secretary of Interior's *Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings* when making structural changes, such as soundproofing, the historic qualities may be affected. The potential impact from this program on the West runway continues to be studied. The results of this study will be incorporated into a Record of Decision to be

prepared after the technical reevaluation of the West Runway.

- In any event, the increase in noise levels will not affect the relevant characteristics of these properties from the standpoints of either architectural significance or place in history.

Further details with respect to the impacts by each runway follow.

* * * * *

**DOT Section 4(f); Historic and Architectural; and Archeological and Cultural Resources**

* * * * *

**West Side**

The project for the Runway 16/34 West will not require the actual use or acquisition, incorporation or control of any Section 4(f) park and recreation lands. Further, the approved project will not result in adverse indirect impacts to any Section 4(f) park and recreational lands that would constitute a "constructive use." Although the new runway will result in increases in aircraft noise levels over some of these lands when compared to the No-Action Alternative, the noise levels will not be substantial and will be below FAA accepted thresholds of compatibility for such lands.

For several reasons, the FAA has decided to give final, unconditional approval for Runway 16/34 West at this time, subject to the technical reevaluation that must occur before it can be built. First, all known environmental impacts have been thoroughly studied in this EIS process; the only unknown impacts are only potential ones to possibly eligible historic properties and may be solely attributable to the airport's noise mitigation program, not to the project. Second, there is substantial public benefit in having the FAA make a final decision now

on the location of the West runway. This decision removes any uncertainty regarding the configuration of this runway on the ALP. As a result, communities on the West side of the airport will be able to make intelligent, informed decisions regarding land use and other matters, well in advance of actual construction. Third, before any construction can begin, there will be a technical reevaluation, which will include a reexamination of the items discussed in this ROD, to determine whether any changes have taken place, as well as a discussion of the conclusion of the Section 106 process. Thus, there are substantial benefits to making this decision now.

* * * * *

Conditions of Approval

- The mitigation measures that will be implemented are those listed in the FEIS (Section S.7 of the Summary, and Section 4.5). The FAA will monitor the implementation of these mitigation actions as necessary to assure that they are carried out as project commitments. These measures, which constitute all the practicable means to avoid or minimize environmental harm from the project, are hereby adopted.

- Project contractors will apply for and obtain the appropriate Texas Air Control Board permits prior to construction. FAA grant agreements with the airport sponsor will ensure that these standard permits will be obtained prior to the commencement of construction.

- Provisions of the Section 404 Nationwide Permit 26 will be followed to ensure compliance. Of particular importance is General condition 10, of the "Notification," which is applicable in this case. Condition 10 and all other conditions of approval of the Nationwide Permit 26 are made conditions of approval of this ROD by the FAA.

- Development of an erosion control plan during the design phase will be required by FAA (FAA Advisory Circular 150/5370-10A) prior to commencement of construction.

- Further consultation, required under Section 106 of the National Historic Preservation Act, relative to historic properties in the city of Grapevine, will continue as described above in Chapter 7. The actual expenditure of federal funds and approval to proceed with construction for Runway 16/34 West will be prohibited until this process is completed and the results of the consultation reviewed as part of the reevaluation of the West runway.

- FAA ATC operational measures for mitigating noise impacts have been selected for each new runway program, as listed in the FEIS at Section 4.5.1.1, and are adopted.

Letter, Nissley to Sturns, September 28, 1993

Advisory
Council On
Historic
Preservation

September 28, 1993

Mr. Vernell Sturns
Executive Director
Dallas/Ft. Worth International Airport
East Airfield Drive
P.O. Drawer DFW, TX 78061

Dear Mr. Sturns:

This letter responds to your letter of July 2, 1993 which conveyed concerns regarding our decision to object to your determination of no adverse effect for the Dallas/Ft. Worth International Airport Expansion.

You have raised several areas of concern about the Council's action, including the lack of consultation with FAA, consistency with prior actions on airport noise and the applicability of FAA general noise impact standards. I will address each as it relates to this case.

Consultation with FAA

At the outset, it is important to note the procedural framework in which the Council's action has taken place. This has significant bearing on the interaction with FAA, the role of concerned citizens and comparisons with previous Council cases alluded to in your letter. The regulations implementing Section 106 (36 C.F.R. Part 800) require that the Federal agency, after identifying historic properties that may be affected by its undertaking, apply the "Criteria of Effect" to historic properties within the undertaking's area of potential effect, in consultation with the State Historic Preservation Officer (SHPO) and giving

consideration to the views, if any, of interested persons (36 CFR § 800.5(a)). In consultation with the SHPO, the Federal agency must then apply the "Criteria of Adverse Effect" to those properties found to be affected. (36 C.F.R. § 800.5(c).

If the Federal agency determines the effect is not adverse, the agency official submits the finding to the Council, along with documentation of the views of the SHPO. The Council then has the option to accept the determination or object to it (36 C.F.R. § 800.5(d)). If the Council objects, then the effect shall be considered adverse (36 C.F.R. § 800.5(d)(2).

This was how the FAA finding of No Adverse Effect came to the Council. It should be noted that this was one of approximately 500 such cases per year processed by the Council's Western Office of Review. It should also be noted that the regulations neither require Council consultation with the Federal agency on a determination of no adverse effect nor is it the practice of the Council to consult on such threshold determinations. The evaluation of adverse effect is an initial step in the Section 106 process, designed to separate those cases where effects to historic properties are not adverse and therefore need no further review from those with the potential to harm historic properties and accordingly require the investigation of mitigation measures.

In the present case, the Council reviewed the record before it, including the unsolicited views of preservation advocates, applied the criteria set forth in the regulations and determined that the FAA finding was erroneous. The single consequence of this action is procedural, requiring that the Federal agency, the SHPO and the Council consult to determine whether there are suitable measures that FAA can take to avoid or mitigate the adverse effects. It does not require they be avoided or that the project be altered; it only requires that the effects be considered during FAA's planning of the project.

There is another aspect of the current case that you should understand. While the Council had no obligation to consult with FAA during the development of the No Adverse Effect determination, we did seek to contact FAA about the project at an

early stage. We wrote to FAA on May 11, 1992 inquiring about the proposal as a result of an inquiry to us by an interested party (Attachment 1). FAA responded on July 29, 1992, stating we had a "basic misunderstanding" of the project and they would consult with the SHPO. We heard no more from FAA until May 10, 1993, when we received its determination of no adverse effect.

Thus, while FAA was clearly aware of the Council's interest in the project, at no time during this past year did FAA or the airport authority attempt to contact the Council or share any information regarding the evaluation of potential effects of the project. During this time, the only information we received came from the SHPO and the City of Grapevine.

You have raised concerns regarding the submission to the Council of views and opinions by various opponents of the project. It is important to note that the Council's regulations emphasize public participation and allow for interested parties to offer their views (36 CFR § 800.1(c)). Your statement, "We do not understand how the Council can admit the project's opponents to its process while excluding the other side," is misleading. The Council's process is always open to the views for the public, regardless of which side they take. At the same time, because of this public concern, we invited FAA to share information on the project a year before it made its no adverse effect determination. FAA chose not to.

The basis for the council's objection

At this point, an examination of the Council's Criteria of Effect and Adverse Effect (36 C.F.R. § 800.9) is necessary. The Criteria of Effect state, "An undertaking has an effect on a historic property when the undertaking may alter characteristics of the property that may qualify the property for inclusion in the National Register. For the purpose of determining effect, alteration to features of the property's location, setting or use may be relevant depending a property's significant characteristics and should be considered." The majority of historic properties in the Area of Potential Effect (APE) of DFW were determined

eligible under Criteria A and C of the Secretary of the Interior's Criteria for the National Register of Historic Places. Criteria A identifies properties that are significant for their "...associations with events that have made a significant contribution to the broad patterns of our history"; Criteria C defines properties that "embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction."

The July 21, 1991, letter from the SHPO to FAA states that "38 properties are eligible under Criteria C for their significance as representative types of architecture typical of a small urban setting." It is important that a significant aspect of the historic properties under consideration is their small urban setting under Criteria C. Runway 16-34 clearly has an effect on the setting of these historic properties, as the intrusion of aircraft noise and overflights may (not necessarily "will") alter the significant characteristics of these properties.

The regulations continue, "An undertaking is considered to have an adverse effect when the effect on a historic property may diminish the integrity of the property's location, design, setting, materials, workmanship, feeling or association." They state that adverse effects "include, but are not limited to: (1) Physical Destruction, damage, or alteration of all or part of the property; (2) Isolation of the property from or alteration of the character of the property's setting when that character contributes to the property's qualification for the National Register; (3) Introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting (36 C.F.R. § 800.9(b)(1)-(3)). The most pertinent adverse effect in DFW is the last. There is no question that an introduction of 49,000 overflights per year above historic properties that did not previously have overflights and are significant in part to their "small urban setting" constitutes an adverse effect in accordance with the regulations. The introduction of the overflights create visual, audible and atmospheric elements that are out of character with the historic properties; they may well "diminish

the integrity of the property's location,...setting,...feeling or association."

Relation of FAA noise standards to the adverse effect finding

It is imperative to note that the criteria that the Council applies in reviewing no adverse effect determinations are those set forth in the Section 106 regulations. Other standards or criteria are useful to assist the Council, but in the end the Council must conform to 36 C.F.R. Part 800. Accordingly, the Council uses both average noise data (Ldn) and single event noise level data (SEL) to aid its assessment of noise impacts on historic properties. We have always been concerned that information on average noise levels, considered alone, would be inadequate to fully assess whether the effects to historic properties will be adverse. However, they are useful in giving the Council the overall picture of the nature of an action's effects on historic properties.

In the DFW airport case, we considered the noise data in this way. Both Ldn and SEL information in our review supported a finding of adverse effect in accordance with our regulations, although as noted they were not the exclusive basis for the determination.

Factors that supported the finding that the project might alter significant characteristics of the historic properties in a way that could diminish their integrity included:

- In the year 2010, Ldn levels in the residential historic district will be more than twice as high with the west runway as compared to levels without the runway (FEIS:Table A5-4). A 10 decibel increase represents a doubling of perceived noise levels. For example, the anticipated impact on two identified historic properties is:

  - Wiggins Home: 10.3 Ldn increase
  - Steward Home: 12.5 Ldn increase

- In the year 2010, SEL levels in the residential historic district will be more than four times as high with the west runway as

compared to levels without the runway (FEIS: Table A5-4). A 20 decibel increase represents a quadrupling in perceived noise levels. Again, for two properties:

- Wiggins Home: 20.6 SEL increase
- Steward Home: 23.3 SEL increase

SEL levels within the APE will be approximately 110 decibels in 1997 (FEIS: Table A5-3). This noise is comparable to a rock band, the sound level inside an NY City subway, a diesel truck at 50 feet or the noise experienced by a chain saw operator.

None of these noise levels are in keeping with the historic properties and their setting, feeling or association (36 CFR § 800.9(b)). The introduction of these SEL and Ldn noise levels by the undertaking support the Council's finding of adverse effect, as they are clearly out of character with the properties and may alter the properties setting in accordance with § 800.9(b)(3).

Comparison with previous Section 106 cases

Finally, comparisons to other Council actions in evaluating noise impacts for airport expansions have been made. For example, the Louisville, Kentucky, airport expansion has been compared by some to the DFW situation. There are several distinctions between the expansion of the Louisville airport and the expansion at Dallas-Ft. Worth.

1. *Procedural Status.*

In Louisville, the Council received a request to reconsider a completed and closed Section 106 case regarding the Old Louisville Historic District. The Council was requested to reevaluate an existing Memorandum of Agreement (MOA) documenting an agreed upon solution by all parties that signed the MOA. In such a circumstance, the Council may utilize broad discretion to determine whether or not to change its position. In the Louisville airport case, the Council decided not to reopen the closed case. In the DFW airport situation, the Council received a determination of no adverse effect. In accordance with our regulations,

we have 30 days to review the documentation and object, propose changes or agree with the Agency's finding. Our review must be governed by the Criteria of Effect and Adverse Effect (36 CFR § 800.9) Our decision to object was made according to those procedures.

In Louisville airport, the FAA completed its Section 106 requirements in the procedurally prescribed manner. The MOA was signed in November 1990. The Council commented formally by signing the MOA. The Record of Decision (ROD) was issued January 7, 1991. In contrast, the ROD for DFW was issued April 6, 1992. The Council wrote an inquiry to FAA in May 1992 requesting information on what was being proposed. The Section 106 process still has not been completed to date. In this case, it may be that the opportunity for the Council to make meaningful comments becomes moot because the final decision for placement of the runway has been made. It appears that there are no alternatives or options other than the final selected alternative.

2. *Area of Potential Effects* (APE). In Louisville, there were no historic properties within the APE which was defined by a single 65 Ldn contour line. In contrast, the APE at DFW is defined much more broadly and includes a noise mitigation buffer, "in view of the variability of the 65 Ldn contour over Grapevine" (FEIS: 3-149). The buffer zone was established to account for deviation between the forecast and the actual activity when the runway is operational. The noise mitigation buffer at DFW has four individually eligible historic properties and one eligible district for listing on the National Register of Historic Places (FAA's Assessment of Effects, Nov. 1992:7). The district includes portions of nine residential blocks.

In addition, the proposed land use mitigation program, to be funded in part by FAA, includes the historic properties within the buffer zone. Proposed mitigation for the DFW airport includes a federally funded mitigation program to provide soundproofing and compensation for homeowners. The historic district and historic properties located within the APE are included in this program. FAA's FEIS states the purpose of the noise

mitigation program is to permit, "...homeowners to be compensated for adverse effects caused by the project."

3. *Urban vs Exurban Context.* The environmental context of the historic resources located in Louisville and DFW are considerably different and accordingly merit different evaluations. Louisville involved the old Louisville Historic District, a large urban residential district with a small urban park in the center. The historic properties and district located in the City of Grapevine represent a small "exurban" Main Street town with a population just over 29,000. As such, the small town atmosphere exudes a sense of quietness and portions of Grapevine today retain a "feeling of a semi-rural area" (Tarrant County Historic Resources Survey 1990:6). Grapevine remained an agricultural trade center with an approximate population of 2,000 up to the mid-1900s. The identified historic properties and district are residential and date from the late 1800s to the early 1900s. With the proposal of the west runway, overflights not previously experienced in Grapevine will become a part of life. Noise levels not typically compatible with this setting will be introduced. FAA estimates 49,000 overflights during the first year of operation with the potential to develop into twice the predicted volume (FEIS 1992:3-149). Had the same intrusions been projected in an urban setting such as the Old Louisville Historic District, they may not have risen to the level of adverse effect.

For these reasons, the Council stands by its position conveyed in our June 8, 1993 letter. We continue believe that FAA's undertaking of the construction of Runway 16-34 West at the Dallas-Ft. Worth airport may adversely effect historic properties. Accordingly, the next step in the process is to consult. Mr. Sturns' letter of July 2, 1993 refers to "several drafts of a Memorandum of Agreement (MOA)" between DFW and the SHPO (Texas Historic Commission). The Council's regulations, 36 CFR Part 800, clearly indicate a MOA is required when a determination of *adverse effect* is made. If there is a draft MOA, we request to review it.

Sincerely,
/s/
Claudia Nissley
Director, Western Office of Review

Letter, Layton to DeHart, January 14, 1991

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

Mr. Clyde M. DeHart, Jr.
Regional Administrator
Federal Aviation Administration
Southwest Region
Fort Worth, Texas 76193-0001

Dear Mr. DeHart:

In accordance with our responsibilities under Section 309 of the Clean Air Act, the National Environmental Policy Act (NEPA), and the Council on Environmental Quality (CEQ) Regulations for Implementing NEPA, the Environmental Protection Agency (EPA) has completed our review of the Draft Environmental Impact Statement (EIS) prepared by the Federal Aviation Administration (FAA) for the proposed construction of two new North-South runways and related expansion at the Dallas/Fort Worth (D/FW) International Airport, Texas.

In addition to the no-action alternatives, the Draft EIS considered three alternatives to the 16/34 East runway, and eleven alternatives to the 16/34 West runway. The preferred alternatives were identified as: (1) runway 16/34 East which would be 8,500 feet long, would be located 5,000 feet east of existing runway 17L/35R and would be operational in 1992; and (2) runway 16/34 West which would be 9,760 feet long, would be located 5,800 feet west of existing runway 18R/36L and would be operational in 1997, or when needed by aviation demand.

Our agency has been actively involved with this project since February 21, 1989, when we first offered scoping comments to the FAA on the original proposal to add one runway to the D/FW Airport. The decision was made to add two runways and comments were requested. We again offered both oral and written scoping comments on May 22. On June 29, we met with FAA staff to discuss our comments and on July 6, we clarified our

concerns to them by letter. We repeated our concerns in an October 26 letter after attending a public meeting on October 23. Our letters to the FAA during this time contained the same concerns we have now. Throughout this time period we continued to make our concerns known.

The following comments identifying these concerns are offered for your consideration:

*Limiting the Scope of the EIS:*

The FAA limited the scope of the EIS by excluding many actions that are associated with the proposed D/FW Airport expansion. The FAA indicates that these actions do not warrant detailed environmental assessment in the EIS because they have been: (1) evaluated earlier in an environmental document, (2) are categorically excluded, or (3) will be evaluated later. By failing to include all of these actions and their associated impacts in a single EIS, a comprehensive environmental assessment of the entire airport expansion has not been provided and disclosed to the public. The scope of an EIS is defined at 40 CFR 1508.25 of the CEQ regulations as the range of actions, alternatives and impacts to be considered in an EIS. It further states that to determine scope, agencies shall consider connected actions, cumulative actions and similar actions. For example, the extension of the existing runways was not included in the EIS because FAA had evaluated this action a few months earlier in a separate technical reevaluation (EA) report. By excluding this related action from the EIS, it appears the FAA is segmenting the environmental analysis of the entire airport expansion. Specific concerns on the technical reevaluation report, categorical exclusions and Environmental Assessments (EA's) are as follows:

*Technical Reevaluation:*

Page 1-34 of Volume 1 of the EIS, and pages 18, 25 and 26 of Volume II indicate that the construction of proposed extensions of the two existing middle runways 18L/36R and 17R/35L and associated actions are assumed to be complete. Rather than include the

construction in the EIS, the FAA evaluated the adequacy of the 1974 EIS in describing the environmental effects of this proposed action in a technical reevaluation. This excludes the construction impacts from consideration in the EIS. This is done even though the extensions, as well as the new East runway 16/34 proposed in the EIS, will both be constructed in 1992, on the same airport. We have determined that these two runway construction actions are connected, and will have similar impacts since they will be built at the same time, and on the same airport. Extending the two middle runways (constructing 4,000 feet of new runway) involves potentially significant environmental impacts, and the impacts of these extensions, when viewed with the proposed action in the EIS, would have cumulatively significant impacts and therefore should have been included in the same EIS. By excluding these impacts from the EIS, the FAA did not comply with 40 CFR 1508.25(a)(2) which states that, "cumulative actions, when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement." By excluding a discussion of these impacts from the EIS, the assessment is insufficient. Also by excluding these impacts, the FAA segmented the EIS and severely limited its scope. Additionally, our October 26, 1989, scoping letter to Mr. Gene L. Faulkner, Manager, Airports Planning Branch, FAA, Southwest Region, Fort Worth requested that both of these actions be considered in one EIS. We consider this exclusion as nonresponsive to our scoping comments.

Categorical Exclusions:

Many proposed D/FW Airport actions were considered to be categorical exclusions as stated in the EIS in Volume II, Appendix 3 and Volume I, page 1-34. Categorical exclusions should be used for actions that individually or cumulatively do not have a significant

effect on the human environment. However, the construction of this very large $1,000,000,000 redesigned new terminal complex on the west side of the D/FW Airport and associated new expanded auto parking facilities does not fit that category, and we have specifically and repeatedly asked that the environmental impacts for this construction activity be assessed and included in the current Draft EIS. Our scoping letters dated May 22 and October 26, 1990 requested environmental analysis of the terminal complex. This use of the categorical exclusion segments the EIS and limits its scope. The construction of the terminal complex is closely related to the construction of the two new runways and we consider them to be a single course of action. Therefore, this segmentation does not comply with Section 1502.4 of the CEQ regulations which states that, "parts of proposals which are related to each other closely enough to be, in effect, a single course of action, shall be evaluated in a single EIS." By excluding a discussion of these impacts from the EIS, the assessment of these impacts is insufficient.

We note that the EIS on pages 27, 28, and 29 of Volume II attempts to explain how these impacts were addressed 16 years ago in the 1974 EIS. However, it fails to explain how the environmental regulations, standards and determinations have changed in these past 16 years, and how the redesign of the terminal would alter impacts.

Page ii explains how the EIS was developed from the DFW Airport Development Plan. It has been brought to our attention that numerous other actions are listed in this Plan but the actions and impacts of these actions were excluded from the EIS. These actions include: Ultimate lengthening of the parallel runways by an additional 1,640 feet to the south to accommodate supersonic aircraft, completing Taxiway C parallel to Runway 18R/36L as well as other taxiway and apron area construction, two passenger processing

terminals beyond the crossover taxiways (each with a processing capacity of 62.8 million passengers/year), underground automated transit system to connect terminals with concourses, an air cargo handling facility (frequent nighttime flights could markedly increase noise impacts), demolition of existing Terminals 2E, 3E and 2W, demolition of Hyatt Hotel and accompanying support facilities, proposed State Highway 360 extension and State Highway 161 over Airport property among others.

*Environmental Assessments:*

Page 1-34 of Volume I indicates that many actions were not included in the EIS because EA's on the actions were not yet completed. Many of these actions are closely related to the Airport expansion, and as such, their environmental impacts should have been included in the EIS. This use of EA's segments the EIS and limits its scope. Specifically, the installation of the new radar system as well as the construction of the two new air traffic control towers on the east and west sides of the D/FW Airport are closely related to the construction of the two new East and West runways and are a single course of action. Therefore, as we indicated, this segmentation does not comply with Section 1502.4 of the CEQ regulations which states that, "parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single EIS." By excluding a discussion of these impacts from the EIS, the assessment of these impacts is insufficient. In our July 6 and October 26, 1989, scoping letters, we specifically asked that the EIS address radiation impacts from the new large air traffic radar systems. Since these impacts were not included in the EIS, this omission is nonresponsive to our scoping comments.

*Alternatives:*

The FAA should discuss in more detail alternatives outside of adding new runways on the DFW Airport. We suggest the EIS

discuss using Love Field and other local metroplex airports to absorb some of the expected future traffic especially since there apparently is excess capacity at Love and the possibility of lifting the Wright Amendment is seriously being studied. Another alternative in need of additional discussion is scheduling more flights during off-peak flying periods.

*Wetland Impacts:*

The Draft EIS provided an analysis of potential wetland impacts associated with the construction of the preferred alternatives for both proposed runways. According to page 4-113 of the Draft EIS, runway 16/34 East (Alternative 7) would affect 11.8 acres of wetlands and runway 16/34 West (Alternative 2) would affect 13 acres of wetlands.

The Draft EIS indicates that the Fort Worth District Corps of Engineers was contacted to determine permit requirements and specific mitigation needs. It further indicates that applicable measures for wetland impacts will be determined during the permitting process and specific mitigation measures will be developed in cooperation with permitting and permit review agencies.

If a permit is required, EPA will review the proposed project for compliance with the Federal guidelines (40 CFR 230) [hereafter referred to as the Guidelines] promulgated pursuant to Section 404(b)(1) of the Clean Water Act (CWA).

To comply with the Guidelines, the proposed project must meet all of the following criteria:

> There is no practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem [40 CFR 230.10(a)].
>
> The proposed project will not cause or contribute to significant degradation of waters of the United States, including wetlands [40 CFR 230.10(c)]. Significant degradation includes loss of fish and wildlife habitat, including cumulative losses.

> The proposed project does not violate water quality standards, toxic effluent standards, or jeopardize the continued existence of Federally listed species or their critical habitat [40 CFR 230.10(b)].
>
> All appropriate and practicable steps are taken to minimize adverse impacts on the aquatic ecosystem (i.e., mitigation) [40 CFR 230.10(d)]. This includes incorporation of all appropriate and practicable compensation measures for unavoidable losses to waters of the United States, including wetlands.

EPA supports the national goal of "no net loss of" wetlands. We recommend the preservation and enhancement of existing wetland resources. The FAA should consider alternatives which will preserve these resources in perpetuity. If wetlands would be filled, then the FAA should explain why there are no practicable alternatives to locating the project within wetlands and show how the project has been designed to minimize harm to existing wetlands. Mitigation must be provided for all unavoidable wetland losses.

If the U.S. Corps of Engineers determines that no acceptable alternative site exists for the proposed activity, on-site mitigation should be used to the fullest extent practicable to lessen the degree of impact to a wetland or other aquatic ecosystem. As ecological balances are complex and difficult to duplicate with certainty, techniques should attempt to protect existing resources. Practicable on-site mitigation techniques are required to ensure compliance with the 404(b)(1) Guidelines, and are to be supplemented with other mitigation techniques as appropriate. In situations where on-site mitigation is not sufficient to adequately offset unavoidable adverse impacts, compensation techniques may be considered. Compensation actions, such as creating artificial wetlands are acceptable for unavoidable impacts only. Due to the scientific uncertainty of such compensatory techniques, they should be undertaken, when practicable, in those areas adjacent or contiguous to the discharge site to assure the greatest degree of success.

If fill activities are contemplated, then we recommend that a conceptual mitigation plan be prepared for review and comment by the appropriate resource agencies prior to publication of the Final EIS, and the approved plan incorporated as part of the Final EIS.

*Noise Impacts:*

This Draft EIS is one of the seven EIS's identified in a June 15, 1990, letter from FAA Deputy Administrator Harris to EPA Deputy Administrator Habicht concerning an EPA/FAA agreement regarding noise analysis contained in EIS's from FAA. In that letter, FAA agreed that EIS's on those seven airport projects would include a single event analysis and additional descriptive information to help inform the decision maker and the public on likely noise impacts. It was our intention that the supplemental single event analysis and associated descriptive information would help clarify the conventional noise impact presentations that are based on noise contours and land use compatibility tables.

Prior to publishing the Draft EIS, the FAA requested that EPA accept a Time Above (TA) Grid Analysis in place of the Single Event Analysis specified in the EPA/FAA agreement. We advised the FAA staff that, since the analysis had already been done, we would be willing to accept this presentation provided that the analysis would also include descriptive information which relates TA levels to impacts such as interruption of communication, rest, relaxation, and sleep. On the basis of our review of the EIS, the requested descriptive information has not been provided.

In an attempt to provide a better understanding of Time Above, we computed the TA 85 dB at a specific site (x=9000, y=15000) and determined the number of events exceeding a Sound Exposure Level (SEL) value of 90 dB at this same site. The computed TA 85 dB at this point is 0.7 minute. However, the SEL analysis shows 18 daytime events occurring that exceed SEL 90 dB. If a table of "common" sounds accompanied the text, a reader might obtain a "physical" feel for the effect of exposure

to x minutes at a specified sound level. However, this would still not indicate the annoyance nor activity interference associated with multiple events at that level.

In view of the apparent difficulty in describing the TA metric in these terms, we recommend that the noise analysis in the EIS be supplemented with a single event analysis as called for in the EPA/FAA agreement. A review of the EIS shows that the following information is needed to satisfy the agreement:

> The noise discussion regarding the use of the Day-Night Average Sound Level (abbreviated as DNL, and symbolized as Ldn) and the impacts associated within various Ldn contours needs further explanation. The sole use of the Part 150 Land Use Compatibility Table to assess noise impacts (using the DNL metric) does not provide the public with the necessary information on the extent of probable noise impacts. The fact that one is located in a compatible area does not provide any detail or "feel" for the noise impacts likely to be experienced. Inclusion of the Federal Interagency Table D-1, showing the percentage of people likely to be annoyed at various Ldn levels, and data on the typical range of single event sound levels within each contour band, are the kinds of information that would be helpful in both understanding and assessing noise impacts.
>
> There appear to be numerous parks/recreational areas that are located in the project vicinity. The discussion of noise impacts related to these areas should include general information on the types of activities (sport games, hiking, picnicking, concerts, etc.) that generally take place there. The FAA interpretation, in the Land Use Compatibility Table, that all uses within a "park" are compatible if the exposure is Ldn 75 or less, does not allow for individual park use differences, such as, for example, overnight camping. Even if it is determined that the park, in general, is compatible, the noise impact discussion should include

information on how individual activities such as camping or concerts may be impacted.

The Draft EIS provides little descriptive information on noise impacts. The FAA/EPA agreement indicated that a chart would be provided showing common sounds that relate to noise descriptors used in the document. Such a chart was not provided. A discussion of Ldn and single event sound descriptors should also be included along with a description of how they relate to each other. Finally, the Final EIS should provide additional information on potential effects of noise exposure and sleep disturbance. For example, while the day operations are high compared to night operations (1,802 vs. 233, in 1992) the 233 night operations translate into a nine hour average of 22 operations per hour. The document should discuss, in general terms, the potential number of people that may be awakened due to these operations.

We classify your Draft EIS as EO-2 (Environmental Objections-Insufficient Information). Specifically, EPA expresses environmental objections to the preferred alternative based upon a lack of sufficient environmental analysis in the areas mentioned above. The Draft EIS limits the scope of the proposed action by excluding related actions and environmental impacts through the use of categorical exclusions and EA's to the extent that it does not fully assess potentially significant environmental impacts of the entire Airport expansion.

This identified additional information, data and analyses should be fully incorporated in the Final EIS and made available for public and agency review and comment prior to issuing a Record of Decision on the Airport expansion. Failure of the FAA to fully incorporate this information and environmental analysis in the Final EIS would be considered by the EPA as nonresponsive and not fulfilling the intended purposes of NEPA.

A summary of our comments will be published in the *Federal Register* according to our responsibility to inform the public of

our views on the proposed Federal actions under Section 309 of the Clean Air Act.

We appreciate the opportunity to review the Draft EIS. Because of the seriousness of our concerns, we would like to meet with you to discuss these comments. Either Norm Thomas at (FTS) 255-2260 or Russell Rhoades at (FTS) 255-2213 may be contacted for further coordination. Please send our office five copies of the Final EIS at the same time it is sent to the Office of Federal Activities, U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460.

Sincerely yours,

/s/

for Robert E. Layton Jr., P.E.
Regional Administrator

Letter, Nissley to Lyon, June 8, 1993

Advisory
Council On
Historic
Preservation

June 8, 1993

Hugh W. Lyon
Assistant Division Manager
Airports Division
Federal Aviation Administration
Southwest Region
Fort Worth, TX 76193-0000

Dear Mr. Lyon:

We have reviewed the documentation supporting the Federal Aviation Administration's (FAA) determination that the construction and use of Runway 16-34 West at the Dallas/Fort Worth International Airport (D/FW Airport) will not adversely effect historic properties. This determination is based on the FAA's and the Dallas/Fort Worth International Airport Board's (Board) agreement with the Texas Historical Commission, and the State Historic Preservation Officer (SHPO). In our review, we applied the Criteria of Effect and Adverse Effect, 36 CFR Section 800.9, to this undertaking and conclude that the use of Runway 16-34 West will affect the integrity of the Grapevine Residential Historic District, the Clifford J. Wall House, the Zebulon Jenkins Farmhouse, and the Dunn-Barton House by diminishing their setting, feeling, and association. The use of Runway 16-34 West will cause an adverse effect through the introduction of visual and atmospheric elements and appreciable increases in noise levels that are out of character with these properties and their historic setting. We have reached this decision after considering the noise analysis developed for the Dallas/Fort Worth Environmental Impact Statement (EIS) that was based on the development of Ldn contours of 65 dBA and greater. We

recognize that this methodology has been utilized by the FAA since 1979 and is consistent with the mandates of the Aviation Safety and Noise Abatement Act of 1979 and the FAA's Land Use Compatibility Guidelines. However, we do not consider that the Council's analysis of project effects under Section 106 of the National Historic Preservation Act is limited by these FAA guidelines.

Additionally, we reviewed the "Agreement on Assessing the Effects of Dallas/Fort Worth International Airport Board's Plans to Construct Runway 16/34 West." While this agreement may create certain contractual obligations among the parties, it is not recognized by the Council's regulations as a document that can satisfy the FAA's requirements under Section 106. We are concerned about the existence of this executed agreement not only because it is not consistent with the Council's regulations, but also because it does not fully address the effects of this undertaking on historic properties. Although extensive discussion of this agreement is not warranted, we note that it proposes to place Preservation Easements on properties participating in the Easement Acquisition Program only if the private property owner consents. Several affected property owners and the City of Grapevine have written this office indicating that there is little interest in this aspect of the land use mitigation measures. We also note that the agreement does not require review of soundproofing measures installed by participating property owners who have not granted a Preservation Easement.

We refer back to our letter of May 11, 1992 addressed to Mr. Clyde DeHart, Jr., Regional Administrator for the Southwest Region of the FAA. This letter expressed our concern with the FAA's Record of Decision dated April 6, 1992 that approved the revised Airport Layout Plan and found that both the 16/34 East and 16/34 West Runways are eligible for Federal financial assistance. Although the FAA's decision prohibited the actual expenditure of funds or the commencement of runway construction until the FAA had taken into account the conclusions and recommendations arising from the Section 106 process, it continues to appear that the FAA intends to limit our review of this undertaking to the effects of the noise mitigation program. We

cautioned the FAA at that time that this does not comport with the intent of the Council's regulations. We anticipate that the upcoming adverse effect consultations will provide the Council, SHPO, and any other interested parties with the opportunity to analyze and evaluate project alternatives that may avoid or minimize the adverse effects, not merely mitigate these effects.

While we recognize that the primary responsibility for definition of the APE rests with the federal agency and we acknowledge that the FAA has expanded the undertaking's APE to reflect the potential variability of the noise contour model over Grapevine, we believe that this APE should include all areas within Euless, Grapevine, and rural locations in the vicinity of and between these two communities where land use mitigation measures will be employed.

We look forward to working with you, the SHPO, the Board, and other interested parties to consult under 36 CFR Section 800.5(e) to resolve the adverse effects of this undertaking. If you have any questions, you may contact Lee Keatinge at the Western Office of Review at (303) 231-5320.

Sincerely,

/s/ Claudia Nissley

Claudia Nissley
Director, Western Office
of Review

Letter, Nissley to DeHart, May 11, 1992

Advisory
Council On
Historic
Preservation

May 11, 1992

Clyde M. DeHart, Jr.
Regional Administrator
Federal Aviation Administration
Southwest Region
Ft. Worth, TX 76193-0611

REF: New Runways 16/34 East and 16/34 West, Dallas/Fort Worth International Airport, TX

Dear Mr. DeHart:

It has come to our attention that the Federal Aviation Administration (FAA) issued a Record of Decision (ROD) on to the Dallas/Fort Worth International Airport on April 6, 1992. It approves the revised Airport Layout Plan, finds that both the 16/34 East and 16/34 West Runways are eligible for Federal financial assistance, and approves the East runway for construction. Although this decision is described as a final determination, it specifically prohibits the actual expenditure of any funds or the commencement of Runway 16/34 West construction until it has been reevaluated pursuant to FAA Order 5050.4A to take into account the conclusions and recommendations from the consultation process required by Section 106 of the National Historic Preservation Act. However, it does not place any limitations on Runway 16/34 East, an integral component of this proposed expansion, which is authorized by the ROD for construction in 1992. The construction of the east runway appears to necessitate the construction of Runway 16/34 West on the proposed alignment to fully satisfy aeronautical needs at the airport. Under these circumstances the Council's legislatively mandated

opportunity to consult with FAA regarding alternate sites for the runways that could avoid or minimize the possible effects of this undertaking on historic properties may be preempted. The Council's response to the ROD is that FAA's actions have limited the Section 106 consultation process to a discussion of alternatives that could mitigate the effects of the construction and operation of these runways.

Our regulations at 36 CFR §800.3(c) require the Section 106 review to be completed prior to Federal approval of an undertaking. The regulatory requirement also in § 800.3 states that the 106 process should be "initiated early in the planning stages of the undertaking, when the widest feasible range of alternatives is open for consideration." Our interpretation of the word "alternatives" here encompasses the range of options regarding siting, design, and scale of an undertaking. Limiting the Council's review only to mitigation alternatives does not comport with the intent of this provision.

We also question the FAA's no adverse effect determination since the ROD acknowledges that mitigation of project effects will be necessary. This statement appears to be contradictory. Finally, we believe that FAA's opinion that the projected increases in noise level will not affect the relevant characteristics of historic properties does not fully consider the Criteria of Adverse Effect set out at 36 CFR §800.9(b) of our regulations. In particular, it appears that construction and operation of the west runway will introduce visual, audible, and atmospheric elements that are out of character with historic properties in Grapevine and their setting.

We request that the FAA review its actions to determine if the purposes of Section 106 of the National Historic Preservation Act and the Council's regulations can be met. We are available to discuss FAA's options and, if it appears that our opportunity to comment has not been preempted, to work with you to address and resolve the historic preservation concerns presented by this undertaking.

If you have any questions or would like to discuss the issues set out in this letter, please contact Lee Keatinge of the Western Office of Project Review at (303) 231-5320 or.

Sincerely,

/s/ Claudia Nissley

Claudia Nissley
Director, Western Office
of Project Review